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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1933

No. 213

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, APPELLANT,

vs.

JOHN C. CORBETT, FRED E. STEWART, RICHARD E. COLLINS, WILLIAM G. BONELLI AND HARRY B. RILEY, AS MEMBERS OF THE STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA

FILED JULY 19, 1933.

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[fol. 1]

IN UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

Equity No. 4067R

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a Corporation, Plaintiff,

vs.

JOHN C. CORBETT, FRED E. STEWART, RICHARD E. COLLINS, Ray L. Edgar and Ray L. Riley, as Members of the State Board of Equalization of the State of California; State Board of Equalization of the State of California, and U. S. Webb, the Attorney General of the State of California, Defendants

Action to Enjoin Collection of Taxes under California Use Tax Act of 1935

BILL OF COMPLAINT—Filed August 11, 1936

[fol. 2] The Pacific Telephone and Telegraph Company, a corporation, presents this its verified bill of complaint against defendants above named and designated, and for cause of action complains and alleges as follows:

I

Status of the Parties, and Other Corporations Herein Mentioned

(a) Plaintiff, The Pacific Telephone and Telegraph Company, is, and at all times hereinafter mentioned has been, a corporation duly organized and existing under and by virtue of the laws of the State of California, and a citizen and a resident of said State of California. For many years last past, and at all times mentioned herein, plaintiff has been and now is a telephone and telegraph company engaged exclusively in interstate and intrastate telephone and telegraph commerce and business, and its said interstate and intrastate telephone and telegraph commerce and business are inextricably intermingled, and it could not discontinue its said intrastate commerce and business without being

compelled to withdraw from its interstate commerce and business.

(b) The defendant John C. Corbett is a citizen and resident of the State of California residing in San Francisco in said state; the defendant Fred E. Stewart is a citizen and resident of the State of California, residing in the City of Oakland in said state; the defendant Richard E. Collins is a citizen and resident of the State of California, residing in the City of Redding in said state; the defendant Ray L. Edgar is a citizen and resident of the State of California, residing in the City of San Diego in said state; and the defendant Ray L. Riley is a citizen and resident of the State of California, residing in the City of Sacramento in said state, and said persons constitute the State Board of Equali- [fol. 3] zation of the State of California.

(c) At all times hereinafter mentioned the defendant State Board of Equalization of the State of California was and now is an official board, organized and existing under and by virtue of the constitution and laws of the State of California, consisting of the persons named and described in the foregoing paragraph, with the Controller of the State, Ray L. Riley, acting as an ex-officio member thereof.

(d) The defendant U. S. Webb is a citizen and resident of the State of California, residing in the City of San Francisco, and is the duly elected, qualified and acting Attorney General of the State of California.

(e) Western Electric Company, Incorporated, is and at all times hereinafter mentioned has been, a corporation duly organized and existing under and by virtue of the laws of the State of New York, and a citizen and a resident of said State of New York. Said company maintains two places of business in the State of California, to wit, one at the City of Emeryville, County of Alameda, State of California, and another at the City of Los Angeles, County of Los Angeles, State of California.

II

Jurisdiction

The grounds upon which the jurisdiction of this court depends are as follows:

(a) The matter in controversy greatly exceeds, exclusive of interest and costs, the sum or value of $3,000, to wit, an

alleged indebtedness for taxation claimed to be due to the State of California and payable to the said State Board of Equalization in the sum of money amounting to $16,544.07, and also sums of money which will continue to accrue in the [fol. 4] future according to the terms of the taxing act complained of in this action and the claims of the defendants thereunder.

(b) This suit arises under the Constitution and laws of the United States in that plaintiff seeks herein, pursuant to subsection 14 of section 41 of Title 28 of the Code of Laws of the United States, to restrain and enjoin the enforcement of that certain statute of the State of California, hereinafter described, known as the Use Tax Act of 1935, to the extent that the taxes provided for in and by said act, are imposed on certain materials purchased in interstate transactions by plaintiff from said Western Electric Company, Incorporated, at points outside of the State of California, and shipped in interstate transportation to the plaintiff at places within the State of California, for the purpose of use and thereupon used in conducting its said inextricably intermingled interstate and intrastate telephone and telegraph commerce and business, which tax, so imposed under said act, according to the particulars hereinafter related, constitutes a tax upon the use of such materials in carrying on said interstate and intrastate telephone and telegraph commerce and business and constitutes a tax and burden upon the privilege of using such materials in conducting said interstate and intrastate telephone and telegraph commerce and business and is a burden on interstate commerce contrary to and in violation of the provisions of clause 3, section 8, Article I, of the Constitution of the United States, and that the imposition and collection of said tax effectuates a taking of plaintiff's property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States.

(c) The damages and injury which plaintiff would sustain by reason of said statute if the enforcement thereof in the particulars herein complained of be not restrained [fol. 5] are and would be great and irreparable, and the enforcement of collection of the taxes involved herein and claimed to be due from the plaintiff and which would become due according to the terms of said statute, and the

interpretations thereof by the defendants, and the claims for taxes asserted by said defendants against the plaintiff would continue to run to large amounts and impose upon the plaintiff much accounting work and expense in connection with making returns and payments of said taxes; and by reason of penalty provisions of the said taxing act plaintiff cannot safely disregard the same and await suits for the collection of said taxes for the purpose of testing the validity thereof because large amounts of penalties would accrue and continue to accrue if such course were followed; and the purported remedy prescribed by said taxing act of payment of taxes under protest and suit to recover the same, being the only remedy allowed to the plaintiff under the terms of said act, would and does not provide a prompt, speedy and adequate remedy at law because the purported remedy prescribed and directed in said statute is not a plain and certain remedy, is not a prompt and complete remedy, would not result in compensating plaintiff in full for all of the damages, losses and expenses which would be suffered by it, and would result in a multiplicity of actions in manner and form more particularly hereinafter related.

(d) In addition to the foregoing general statement as to the grounds upon which the jurisdiction of this court depends, the facts, circumstances and conditions hereinafter set forth in this bill of complaint, justify and necessitate the exercise of equity jurisdiction of this court, and the granting to the plaintiff of the relief herein sought, including relief by temporary restraining order, interlocutory and final injunction.

[fol. 6]

III

Description of Plaintiff's Telephone and Telegraph Business and Operations

For many years last past, and at all times mentioned herein, plaintiff has been and now is a telephone and telegraph company conducting and engaged exclusively in interstate and intrastate telephone and telegraph commerce and business, and its said interstate and intrastate telephone and telegraph commerce and business are inextricably intermingled as hereinabove set forth. Plaintiff's telephone and telegraph system extends into several states and is connected with other telephone and telegraph systems,

and, by means of its said telephone and telegraph system and said connections with other telephone and telegraph systems, plaintiff handles a great number of interstate communications and does a great volume of interstate business.

In the necessary operation, maintenance and repair of its said telephone and telegraph system, plaintiff purchases from said Western Electric Company, Incorporated, large amounts of tangible personal property consisting of equipment, apparatus, materials and supplies for and used as integral parts of and exclusively in, and in common for, its said interstate and intrastate telephone and telegraph commerce and business, as hereinafter more particularly alleged. Said purchases are made at points outside the State of California, and said equipment, apparatus, materials and supplies are shipped in interstate commerce by said Western Electric Company, Incorporated, to plaintiff at various points in said State of California.

During the quarterly period of three months ending June 30, 1936, plaintiff purchased from said Western Electric Company, Incorporated, at points outside the State of Cali- [fol. 7] fornia certain tangible personal property of the character hereinabove described, for the total sales or purchase price of the sum of $551,469.

A part of said property was purchased by plaintiff and shipped to it to various points in the State of California as standby telephone and telegraph facilities of plaintiff for its said interstate and intrastate telephone and telegraph business; and said part of said property was held and used by plaintiff as a part of its said interstate and intrastate telephone and telegraph system as such standby facilities as required in the performance of its obligations to the public as a public service company, and in the conduct of its said interstate and intrastate telephone and telegraph business. The total purchase price of said standby telephone and/or telegraph facilities, upon which the tax hereinafter referred to and complained of is based, is the sum of $116,387, and the amount of tax claimed by defendants to be due on account thereof under the Use Tax Act of 1935 of the State of California, the terms of which are hereinafter more fully set forth, is the sum of $3,491.61.

The remaining part of said property consisted of central office switchboards, large private branch exchange switchboards, telephone cables and components of telephone and

telegraph lines purchased by plaintiff and shipped to it from time to time, under respective specific orders of plaintiff, to various points in the State of California for the immediate installation and use by plaintiff forthwith upon its said shipment as part of the said interstate and intrastate telephone and telegraph system of plaintiff and for use exclusively by plaintiff for its said interstate and intrastate telephone and telegraph business; and said part of said property was forthwith upon its arrival installed and used by plaintiff as part of its said interstate and intrastate telephone and [fol. 8] telegraph system, and no part of said property was stored in the State of California for any period of time whatsoever. The total purchase price of said part of said property was the sum of $435,082, and the amount of tax claimed by defendants to be due on account thereof under the terms of the said Use Tax Act of 1935 of the State of California is the sum of $13,052.46.

Plaintiff intends to, and will in the future, continue to purchase from said Western Electric Company, Incorporated, at points outside the State of California like and other equipment, apparatus, materials and supplies for its purposes in conducting its said interstate and intrastate telephone and telegraph business.

The estimated amount of the sales or purchase price of tangible personal property which plaintiff, during each succeeding quarterly period as defined in said Use Tax Act of 1935, will purchase in interstate commerce at points outside the State of California, and which will be shipped to plaintiff to points within the State of California for use in the operation and conduct of plaintiff's said interstate and intrastate telephone and telegraph business, will amount to approximately $360,000; and the estimated amount of the taxes which the defendants, plaintiff is informed and believes and therefore alleges, intend to and will claim to be due from plaintiff on account of the said sales or purchase price of said property under said Use Tax Act of 1935 and the rulings and regulations made by said defendants in connection therewith, will, unless the collection of said tax is restrained by injunction, amount to the sum of approximately $12,000.

Because of the large extent of plaintiff's telephone and telegraph system so operated, it is necessary in the interest of business economy and efficient public service for plaintiff

to purchase much of its supplies in large quantities in antici-
[fol. 9] pation of current and recurring needs and to effect deliveries thereof to the extent reasonably possible in carload lots to the points of distribution and use, and it is necessary to have supplies to meet current requirements distributed over the entire telephone and telegraph system in quantities and at the times necessary to anticipate regular current requirements as well as the regular emergency requirements, and to have such reserves in quantities necessary to meet constantly fluctuating demands and emergencies which result from changes in the public demand for service and the repairs which from time to time unavoidably arise from the destruction of property by reason of fires, storms and other weather conditions and unavoidable casualties which arise in connection with conducting such telephone and telegraph commerce and business, and that materials so distributed and held for such uses and the process for distribution and the holding thereof for such uses are inseparably and essentially a part of the conduct and operation of such telephone and telegraph commerce and business.

All of said articles so purchased by plaintiff from said Western Electric Company, Incorporated, were and are especially designed for use in the operation and maintenance of said telephone and telegraph system, are peculiarly adapted to telephone and telegraph uses as aforesaid and are not suitable for any other use.

Said purchases were made by plaintiff through the use of operating capital consisting of money or current assets definitely devoted to the telephone and telegraph service or through the credit of plaintiff engaged in such telephone and telegraph service; and upon the purchase of said materials and the payment therefor, the expenses therefor were charged into the capital or operating expenses of plaintiff to the appropriate accounts of capital, operation or maintenance, according to the accounting rules and regu-
[fol. 10] lations prescribed for telephone and telegraph companies engaged in interstate commerce under the rules and regulations promulgated by the Interstate Commerce Commission, and all of said items of tangible personal property so purchased by plaintiff from said Western Electric Company, Incorporated, were devoted to the telephone and telegraph service immediately upon their purchase, and that

upon the purchase of said articles, they immediately became a necessary and indispensable part of working capital, materials, supplies, equipment and instrumentalities for the operation and conduct of such telephone and telegraph business; and that the said articles, and each and all of them, became, were and are instrumentalities used indiscriminately and in common, in and for the operation and maintenance of said telephone and telegraph system for conducting said inextricably intermingled interstate and intrastate telephone and telegraph commerce and business from the time the same were purchased therefor.

Said articles of tangible personal property underwent no storage of any character intervening between the ending of the interstate transportation thereof which followed the purchase of said items of property and the time when the same, and each thereof, were allocated and dedicated to uses in the conduct of said interstate and intrastate telephone and telegraph business by plaintiff; but, on the contrary, the said materials, and each item thereof, were purchased by plaintiff for the sole and exclusive use and conduct of its said interstate and intrastate telephone and telegraph business, and at all times from the purchase of said materials until the use thereof by plaintiff, said materials were, and each item thereof was, devoted, dedicated and set apart exclusively for use in such inextricably intermingled interstate and intrastate telephone and telegraph commerce and business, and that any keeping or retention of said materials or any item thereof within the State of California was and is an inseparable part of the use thereof in such inextricably intermingled interstate and intrastate commerce.

[fol. 11] IV

The Pertinent Portions of the Act

The taxing act under which the tax complained of herein is claimed to arise, is an act of the State of California entitled:

"An act imposing an excise tax on the storage, use or other consumption in this State of tangible personal property, providing for the registration of retailers, providing for the levying, assessing, collecting, paying and disposing of such tax, making an appropriation for the administration

hereof, prescribing penalties for violations of the provisions hereof and providing that this act shall take effect immediately."

Said act, chapter 361 of the Statutes of 1935, was approved by the Governor of the State of California June 20, 1935, and ever since has been and now is in full force and effect. For convenience of the court a full, true and correct copy of said act is attached hereto, marked Exhibit "A."

Section 3 of said act provides:

"Sec. 3. An excise tax is hereby imposed on the storage, use or other consumption in this State of tangible personal property purchased from a retailer on or after July 1, 1935, for storage, use or other consumption in this State at the rate of three per cent of the sales price of such property. Every person storing, using or otherwise consuming in this State tangible personal property purchased from a retailer shall be liable for the tax imposed by this act, and the liability shall not be extinguished until the tax has been paid to this State; provided, however, that a receipt from a retailer maintaining a place of business in this State, given to the purchaser in accordance with the provisions of section 6 hereof, shall be sufficient to relieve the purchaser from further liability for the tax to which such receipt may refer; provided further, that the board may by rule and regulation provide that a receipt from a retailer who does not maintain a place of business in this State shall also be sufficient to relieve the purchaser from further liability for the tax to which such receipt may refer."

By section 2(a) of said act, "storage" is defined to mean and include any keeping or retention in this state for any purpose except sale in the regular course of business, of [fol. 12] tangible personal property, purchased from a retailer; by section 2(b) the term "use" is defined to mean and include the exercise of any right or power over tangible personal property incident to the ownership of that property, except that it shall not include the sale of that property in the regular course of business; by section 2(c) the term "purchase" is defined to mean any transfer, exchange or barter, conditional or otherwise, in any manner or by means whatever, of tangible personal property, for a consideration; by section 2(h) "tangible personal property" as used in said act, is defined as personal property which may be

seen, weighed, measured, felt, touched or is in any other manner, perceptible to tne senses; by section 2(i) the term "business" as used in said act, is defined to include any activity, engaged in by any person, including a corporation, or caused to be engaged in by him or it with the object of gain, benefit or advantage, either direct or indirect; and by section 2(g) the term "Board" as used in said act means the State Board of Equalization of the State of California.

Section 4 of said act, so far as material to the questions herein presented, contains the following provisions, to wit:

"Sec. 4. The storage, use or other consumption in this State of the following tangible personal property is hereby specifically exempted from the tax imposed by this act:

(a) Property, the gross receipts from the sale of which are required to be included in the measure of the tax imposed by Chapter 1020, Statutes of 1933 and any amendments made or which may be made thereto.

(b) Property, the storage, use or other consumption of which this State is prohibited from taxing under the Constitution or laws of the United States of America or under the Constitution of this State."

The tax imposed by chapter 1020, Statutes of 1933, of the State of California, referred to in paragraph (a) of section [fol. 13] 4 of said act, commonly known as the "California Retail Sales Tax Act," is an act imposing a tax for the privilege of selling, renting or leasing tangible personal property within the State of California and the effect of the exemption provision contained in said paragraph (a) of said section 4 is to make the said use tax applicable only to tangible personal property purchased in interstate transactions from retailers or sellers outside of the State of California.

Other provisions of the said Use Tax Act require that every retailer, selling tangible personal property for storage, use or other consumption in this state, shall register with the Board and give the name and address of all agents operating in this state, the location of any and all distribution or sales houses or offices, or other places of business in this state, and such other information as the Board shall require (section 5); and that every retailer, maintaining a place of business in this state and making sales of tangible personal

property for storage, use or other consumption in this state, not exempted under the provisions of section 4 of said act, shall, at the time of making such sales, collect the tax imposed by this act from the purchaser (section 6); and it is further provided that the tax imposed by said act shall be due and payable quarterly to the State Board of Equalization on or before the fifteenth day of the month next succeeding each quarterly period, the first quarterly period provided for in said act, commencing with the first day of July, 1935 (section 7). Every retailer maintaining a place of business in this state is required by said act (section 7) to file with the said Board on or before the fifteenth day of the month following the close of each quarterly period, a return for the preceding quarterly period in the form prescribed by the Board, showing the total sales price of the tangible personal property sold by the retailer during the [fol. 14] preceding quarterly period, the storage, use or consumption of which is subject to the tax imposed by said act and said retailer or seller is required to accompany said return by a remittance, payable to the State Board of Equalization, of the amount of tax therein required to be collected by the retailer during the period covered by such return, and every person, storing, using or consuming tangible personal property, purchased from a retailer who does not maintain a place of business in the State of California or is not an authorized tax collector, is required, on or before the fifteenth day of the month following the close of each quarterly period, to file with the Board a return for the preceding quarterly period in the form prescribed by said Board, showing the total sales price of the tangible personal property purchased by him or it during such preceding quarterly period, the storage, use or consumption of which is subject to the tax imposed by said act, and such other information as the Board may deem necessary for the proper administration of said act, and it is required that such return shall be accompanied by a remittance of the amount of tax imposed by said act during the period covered by such return. The Act further provides that, for the purpose of the proper administration of such act, and to prevent evasion of the tax and the duty to collect the same thereby imposed, it shall be presumed that tangible personal property sold by any person for delivery in this state, is sold for storage, use or other consumption in this state, unless the person selling such property shall have taken from the

purchaser, a certificate signed by and bearing the name and address of the purchaser to the effect that the property was purchased for resale. The said act (section 8) further provides for the imposition of a penalty of 10% plus interest at the rate of one-half of one per cent per month, or fraction [fol. 15] thereof, from the date on which the tax or the amount of the tax required by said act to be collected and paid, became due and payable to the state, for the failure to pay any such tax to the state or for failure to make the return of said tax as required by said act, and further provides (section 18) that if the neglect or refusal to file a return as required by said act and to pay said tax was due to fraud or an intent to evade said act, or rules and regulations thereunder, a penalty of 25% of the amount required to be paid by any person or corporation liable for such tax shall be added, plus interest, as therein provided. It is provided that all amounts determined by the said Board to be due on account of the failure or refusal of the person liable therefor, to return, and pay the same, shall become due and payable at the time of service of notice and provided that all taxes or amounts required by said act to be collected and paid to the Board on the date when the same became due and payable, shall bear interest at the rate of one-half of one per cent per month, or fraction thereof, from and after the date when the same became due and payable until paid.

The said act contains the following provisions with reference to the enforcement of said act, to wit:

Collection Procedure: Lien of Tax

"Sec. 20. In any case in which any amount required to be paid to the State in accordance with the provisions of this act, is not paid when due the board may file in the office of the county clerk of Sacramento County, or any other county, a certificate specifying the amount required to be paid, interest and penalty due, the name and last known address of the retailer or other person liable for the same, that the board has complied with all the provisions of this act in relation to the determination of the amount herein required to be paid and a request that judgment be entered against the retailer or other person in the amount herein required to be paid, together with interest and penalty as set forth in the certificate. The county clerk immediately upon the filing of such certificate shall enter a judgment for the people

[fol. 16] of the State of California against the retailer or other person in the amount herein required to be paid, together with interest and penalty as set forth in this certificate. The judgment may be filed by the county clerk in a loose-leaf book entitled, 'Special Judgments for State Retail Sales or Use Tax.' * * *

If any retailer liable for an amount of tax herein required to be collected shall sell out his business or stock of goods or shall quit the business, he shall make a final return and payment within fifteen days after the date of selling or quitting business. His successor, successors or assigns, if any, shall be required to withhold sufficient of the purchase money to cover the amount of such taxes herein required to be collected and interest or penalties due and unpaid until such time as the former owner shall produce a receipt from the board showing that they have been paid, or a certificate stating that no amount is due. If the purchaser of a business or stock of goods shall fail to withhold purchase money as above provided, he shall be personally liable for the payment of the amount of taxes herein required to be collected by the former owner, interest and penalties accrued and unpaid by any former owner, owners or assignors.

In the event that any person is delinquent in the payment of the amount herein required to be paid by him, the board may give notice of the amount of such delinquency by registered mail to all persons having in their possession, or under their control, any credits or other personal property belonging to such person, or owing any debts to such person at the time of the receipt by them of such notice and thereafter any person so notified shall neither transfer nor make any other disposition of such credits, other personal property, or debts until the board shall have consented to a transfer or disposition, or until twenty days shall have elapsed from and after the receipt of such notice. All persons so notified must, within five days after receipt of such notice advise the board of any and all such credits, other personal property or debts, in their possession, under their control or owing by them, as the case may be.

At any time within three years after any person is delinquent in the payment of any amount herein required to be paid, the board may proceed forthwith to collect such amount in the following manner: The board shall seize any property, real or personal, of such person and thereafter

sell at public auction such property so seized, or a sufficient portion thereof, to pay the amount due hereunder, together with any interest or penalties imposed hereby for such delinquency, and any and all costs that may have been incurred on account of such seizure and sale. Notice of such intended sale and the time and place thereof, shall be given to such delinquent person in writing at least ten days before the date set for such sale by enclosing such notice in an envelope addressed to such person at his last known address or [fol. 17] place of business, if any, and depositing the same in the United States mail, postage prepaid, and by publication for at least ten days before the date set for such sale in a newspaper of general circulation published in the county or city and county in which the property seized is to be sold; provided that if there be no newspaper of general circulation in such county or city and county, then by the posting of such notice in three public places in such county or city and county ten days prior to the date set for such sale. The said notice shall contain a description of the property to be sold, together with a statement of the amount due, including interest, penalties and costs, if any, the name of the person from whom due, and the further statement that unless the amount due, interest and penalties and costs are paid on or before the time fixed in said notice for such sale, said property, or so much thereof as may be necessary, will be sold in accordance with law and said notice.

At any such sale, the property shall be sold by the board in accordance with law and said notice, and the board shall deliver to the purchaser a bill of sale for the personal property, and a deed for any real property so sold, and such bill of sale or deed shall vest the interest or title of the retailer or other person liable for the tax in the purchaser. The unsold portion of any property so seized may be left at the place of sale at the risk of the retailer or other person liable for the tax. If upon any such sale, the moneys so received shall exceed the total of all amounts including interest, penalties and costs due the State, any such excess shall be returned to the retailer, or other person liable for the tax, and his receipt therefor obtained; provided, however, that if any person having an interest or lien upon the property, has filed with the board prior to any such sale notice of such interest or lien the board shall withhold any such excess pending a determination of the rights of the respective parties thereto by a court of competent jurisdiction. If, for

any reason, the receipt of such retailer or other person liable for the tax shall not be available, the board shall deposit such excess moneys with the State Treasurer, as trustee for such owner, subject to the order of such retailer or other person liable for the tax, his heirs, successors or assigns.

It is expressly provided that the foregoing remedies of the State shall be cumulative and that no action taken by the board or Attorney General shall be construed to be an election on the part of the State or any of its officers to pursue any remedy hereunder to the exclusion of any other remedy for which provision is made in this act.

[fol. 18] Arbitrary Assessments Against Consumers

Sec. 21. If any person storing, using, or otherwise consuming in this State tangible personal property purchased from a retailer maintaining a place of business in this State neglects or refuses to pay the tax imposed by this act, the board shall make an estimate based upon any information in its possession or that may come into its possession of the sales price of the property and on the basis of said estimated sales price compute and assess the tax payable by such person, adding to the sum thus arrived at a penalty equal to ten per cent thereof. All such assessments shall bear interest at the rate of one-half of one per cent per month, or fraction thereof, from the fifteenth day after the close of the period or periods, as the case may be, for which the amount of tax should have been paid to the State until the date of payment. Promptly thereafter the board shall give written notice to such person of such estimate, tax and penalty, the notice to be served personally or by mail in the manner prescribed by the provisions of section 1013 of the Code of Civil Procedure."

In addition to the penalties hereinbefore referred to, the Act contains the following penalty provisions:

"Sec. 30. Any retailer or other person failing or refusing to furnish any return hereby required to be made, or failing or refusing to furnish a supplemental return or other data required by the board, or rendering a false or fraudulent return, shall be guilty of a misdemeanor and subject to a fine of not exceeding five hundred dollars ($500) for each such offense.

Any person required to make, render, sign or verify any report as aforesaid, who makes any false or fraudulent return, with intent to defeat or evade the assessment or determination of amount due required by law to be made, shall be guilty of a misdemeanor, and shall for each such offense be fined not less than three hundred dollars ($300) and not more than five thousand dollars ($5,000) or be imprisoned not exceeding one year in the county jail or be subject to both said fine and imprisonment in the discretion of the court.

Sec. 31. Any violation of the provisions of this act, except as otherwise herein provided, shall be a misdemeanor and punishable as such."

It is provided by said act (section 25) that the State Board of Equalization shall have the power to make tax assessments, to make determination of the amount of taxes, penalties and interest due, to make and prescribe rules and [fol. 19] regulations relating to the administration and the enforcement of the provisions of the said act and the said Board is charged with the enforcement of the provisions of said act.

The Attorney General of the State of California is the chief legal representative and attorney for said state and for said Board and under the Constitution and laws of said state, there is vested in him the power, and imposed upon him the duty, to represent the state in the commencement and prosecution and/or to direct the institution and prosecution of suits for taxes or penalties due to the State of California and generally to represent the state as its attorney at law in the collection of taxes or other indebtedness due the State of California or to prosecute persons liable to penalties provided for in tax statutes including the said Use Tax Act of 1935, and it is expressly provided by said act (section 28) that at any time within three years after any amount required thereby to be collected has become due and payable, and any time within three years after the delinquency of any tax, the Board may bring an action in the courts of this state or any other state, or any court of the United States in the name of the People of California, to collect the amount delinquent together with penalties and interest, and that the Attorney General must prosecute such action.

The said act contains the following provisions with reference to the distribution of taxes, interest and penalties collected and to be collected under said act:

"Sec. 27. All fees, taxes, interest and penalties imposed and all amounts of tax herein required to be paid to the State under this act must be paid to the board in the form of remittances payable to the State Board of Equalization of the State of California, and said board shall transmit such payments to the State Treasurer to be deposited in the State treasury to the credit of the retail sales tax fund. [fol. 20] There is hereby appropriated, in addition to any other moneys appropriated, the sum of one hundred forty-one thousand five hundred dollars out of the 'retail sales tax fund;' of such amount one hundred thousand dollars may be expended by the Board of Equalization, twenty-five thousand dollars may be expended by the Controller, ten thousand dollars may be expended by the State Department of Finance and six thousand five hundred dollars may be expended by the State Treasurer. The balance of the moneys paid under this act and deposited in the retail sales tax fund shall, upon order of the State Controller, be drawn therefrom for the purpose of making refunds hereunder or be transferred to the general fund of the State."

The said act contains provisions relating to reassessments, redetermination of taxes paid, and refunds for erroneous or illegal payments, and expressly provides by the terms of section 29 thereof, as follows:

"No injunction or writ of mandate or other legal or equitable process shall issue in any suit, action or proceeding in any court against this State or against any officer thereof to prevent or enjoin under this act the collection of any tax or any amount of tax herein required to be collected; but after payment of any such tax or any such amount of tax herein required to be collected under protest, duly verified and setting forth the grounds of objection to the legality thereof, the retailer or person making the payment may bring an action against the State Treasurer in a court of competent jurisdiction in the county of Sacramento for the recovery of the amount paid under protest. No such action may be instituted more than sixty days after the tax or the

amount herein required to be collected and paid to the State becomes due and payable, and failure to bring suit within said sixty days shall constitute waiver of any and all demands against the State on account of alleged overpayments hereunder. No grounds of illegality shall be considered by the court other than those set forth in the protest filed at the time of the payment of the tax or the amount herein required to be collected and paid to the State. If in any such action judgment is rendered for the plaintiff, the amount of the judgment shall first be credited on any taxes or amounts due from the plaintiff under this act, and the balance of the judgment shall be refunded to the plaintiff. In any such judgment, interest shall be allowed at the rate of six per cent per annum upon the amount found to have been illegally collected from the date of payment of such amount to the date of allowance of credit on account of [fol. 21] such judgment or to a date preceding the date of the refund warrant by not more than thirty days, such date to be determined by the Controller.

In no case shall any judgment be rendered in favor of the plaintiff in any action brought against the State Treasurer to recover any amount paid hereunder, when such action is brought by or in the name of an assignee of the retailer or other person paying said amount, or by any person other than the person who has paid such amount."

V

Pertinent Rulings of the Defendants

Said State Board of Equalization did on the first day of July, 1935, promulgate and adopt rule 11, pursuant to the terms of the California Use Tax Act of 1935, which provides as follows:

"*Property Sold or Used in Interstate Commerce.*—The fact that tangible personal property is purchased in interstate or foreign commerce does not exempt from the tax the storage, use or other consumption of such property in this State after the shipment of the property in interstate or foreign commerce has ended.

The fact that tangible personal property is used in interstate or foreign commerce following its storage in this State does not exempt the storage of the property from the tax. Property is deemed to be stored in this State if held in this

State for any period of time whatever following the delivery of the property to the purchaser or the termination of the interstate or foreign shipment of the property to the purchaser."

Under the construction placed upon said ruling 11, said defendants assert the right and threaten to exact and collect from plaintiff a tax upon said materials and items and each one thereof as hereinbefore specifically set forth, and unless restrained, enjoined and prohibited by an order of this court, will demand and exact from plaintiff the taxes provided under said act upon said materials and items and each one thereof.

VI

Claim for Taxes Due and Threat of Prosecution by Defendants

Under said act, said defendants, and each of them, claim [fol. 22] that there is due from, and payable by, plaintiff, taxes on all plaintiff's purchases of tangible personal property described in paragraph III hereof, for uses in conducting its interstate and intrastate telephone and telegraph business as hereinbefore specifically set forth, and demand payment thereof, and if the plaintiff should fail or refuse to pay such taxes so demanded, said defendants, and each of them, intend and directly and expressly threaten to, and, unless restrained by the judgment or order of this court, will, in pursuance of their said expressed intention, institute and cause to be instituted summary suits or other proceedings to compel the said payment of said tax, interest and penalties provided by said act.

Defendants, and each of them, further threaten, in accordance with the procedure laid down in said act, to cause summary process to be issued for the seizure and sale of personal property of plaintiff used by plaintiff as instrumentalities of interstate commerce in the necessary operation, maintenance and repair of its said telephone and telegraph system, and thereby plaintiff's said business will be interfered with and plaintiff will be prevented from conducting its said telephone and telegraph business to its great and irreparable damage in the sum of more than $50,000, for which damages defendants are not financially able to respond and for which plaintiff has no adequate remedy at law. Defendants, and each of them, threaten to

and will bring repeated suits against plaintiff for further quarterly installments of said tax and subject plaintiff to a multiplicity of suits and harassing litigation to plaintiff's great and irreparable damage.

VII

Irreparable Loss and Expense

The payment of said taxes would require plaintiff to pay [fol. 23] to said Western Electric Company, Incorporated, on or before August 14, 1936, being the time fixed by said Use Tax Act of 1935, as extended by said Board, the several large amounts of tax payment hereinbefore stated and to suffer the loss of use of such money and the earning value thereof until recovered by suit, if recoverable at all, and in order to comply with the requirements of the said act and the demands of said defendants and each thereof, it is necessary for the plaintiff to incur substantial expenses in tax accounting and in keeping records of information concerning purchases and the uses of such properties necessary to defend its rights against the imposition of such taxes and that it will be necessary to continue such accounting unless relieved from the necessity so to do and to pay such taxes by the injunction sought in this proceeding, and such expenses, if so incurred, will constitute a substantial and irreparable loss to the plaintiff.

VIII

The Effect of Said Tax

The imposition of said taxes upon plaintiff as hereinabove alleged under said act by said defendants, and each of them, is a violation of Article I, section 8, clause 3 of the Constitution of the United States, and Article I, section 3 of the Constitution of the State of California; said tax constitutes a direct burden on interstate commerce, contrary to and in violation of the provisions of clause 3 of section 8, Article I of the Constitution of the United States, and Article I, section 3 of the Constitution of the State of California, and effectuates the taking of plaintiff's property without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States and Article I, sections 3 and 13 of the Constitution of the State of California.

[fol. 24] IX

Lack of Adequate Remedy at Law

Plaintiff is without a plain, speedy and adequate remedy at law in this or any other court of the United States or of the State of California, and alleges that its remedy at law in the premises is inadequate in the following particulars:

(a) The only remedial procedure prescribed by said act for the recovery of taxes paid or which may be paid by the plaintiff under said act is to make payment of such taxes under protest and bring an action for the recovery thereof within a short period of limitation, to wit, sixty days following the payment thereof, against the State Treasurer of the State of California, in a court of competent jurisdiction in the County of Sacramento, for the recovery of the amount of taxes paid under protest; that a court of competent jurisdiction in the County of Sacramento, as plaintiff believes, is a state court of competent jurisdiction, being the Superior Court of said county; that such provision of the Act is not intended to provide for an action in the federal court, and that the term "a court of competent jurisdiction in the County of Sacramento," is not descriptive of the federal court, although including within its jurisdiction, the said county; and that such provision is so uncertain and indefinite that it fails to provide plainly and unequivocally a remedy at law, available to the plaintiff in the federal court, and that such question is undetermined either by decision of the state courts or federal courts.

(b) The statutory remedy at law prescribed by said act is inadequate and incomplete in that the provisions of said section 29, hereinbefore quoted, show that in the action prescribed thereby for recovery of tax payments made under protest, interest may or shall be allowed, upon judg-
[fol. 25] ment for the plaintiff, upon the payment found to have been illegally collected, from the date of payment of such amount to the date of allowance of credit on account of such judgment or to a date preceding the date of the refund warrant by not more than thirty days, such date to be determined by the State Controller, and according to said provision, the said law fails to provide for the payment of interest for the full and complete period during which the taxpayer is without the use of the amount of tax money

so paid under protest for such time within thirty days as may be arbitrarily determined by the Controller, which lack of interest payment may extend for a longer period upon any failure to deliver such warrant to the taxpayer upon the date of its issue, and that the provisions of said statute for the payment of interest on account of the wrongful collection of such tax is indefinite and uncertain; and the said law furthermore does not provide a plain and adequate remedy at law because of the failure of said provision to state whether interest shall be allowed from the date of payment of such taxes to and collection by the retailer from the purchaser or whether interest shall run and be paid only from the date of the payment of the taxes to the State Board of Equalization, and in that respect the said remedy is not plain, certain or adequate.

(c) The remedy at law which is prescribed by said act, and particularly section 29 thereof, is uncertain and does not provide a plain and adequate remedy because the same does not plainly state how and by whom payment of such taxes under protest shall be made, whether such protest shall be made by the purchaser contemporaneously with his payment of such tax to a retailer, or whether the same must be made by the retailer contemporaneously with the return and payment of such tax so collected by him to the State Board of Equalization; that a protest to be made contem- [fol. 26] poraneously with payment by the purchaser so as to avoid a waiver of right of protest or to avoid voluntary payment of such tax would necessitate a great mutliplicity of protests on the part of plaintiff in that plaintiff would be required to draw up in legal and sufficient form, a protest stating the grounds for such protest for each and every tax payment made to any such retailer, and to deliver such protest to the retailer, at such place as such retailer might reside or have his place of business, or in the event of failure so to do, according to the provisions of said law, plaintiff would waive its right to assert the illegality of said law or to assert any grounds of illegality not sufficiently set forth in a protest duly filed at the time of the payment of the tax; and that the time when the purchaser or plaintiff would actually pay said tax, when payable to the retailer, would be the time when the same was paid to the retailer and not the time when the retailer made his return and payment of the tax to the state as a tax collector for the state. Such

a procedure is and would be involved and complicated, involving a great multiplicity of protests with the attendant expense and accounting detail, and would involve expense for the employment of an attorney qualified to prepare such protests and would involve expenses of a character not recoverable under the legal remedy provided for in said act; and that said act and the said section 29 thereof, in said respects, fail to provide a plain, speedy and adequate remedy at law, and that the procedure in the respects aforesaid has not been construed by the Supreme Court of the State of California.

(d) Taking into consideration the great multitude of purchases made and which will continue to be made by the plaintiff in connection with the conduct of its said telephone and [fol. 27] telegraph business, a substantial expense in accounting, protesting and recovering by means of the prescribed statutory procedure as laid down in said act, would be involved in keeping accounts and making the calculation and claims for interest, running from the several dates of each of its numerous purchases to the time of refunds of such taxes, penalties and interest thereon, in the event of judgments for recovery thereof by the plaintiff, and such expenses would not be recoverable under the terms of said statute and would constitute an irreparable loss in a substantial amount.

(e) The statutory remedy at law prescribed by said act is indefinite and uncertain and does not provide a plain and adequate remedy for the recovery of such taxes in that said act fails to plainly prescribe whether the tax so paid under protest may be recovered only by the person making the payment directly to the State Board of Equalization, that is to say, the retailer, when he makes the payment to the Board or the purchaser, when making direct payment under a consumer's return, and in that respect the said statute has not been construed by the Supreme Court of the State of California.

(f) The said statute is further uncertain in its provision relating to the rendition of judgment, to wit, the concluding paragraph of section 29 provides that in no case shall any judgment be rendered in favor of the plaintiff in any action brought against the State Treasurer to recover any amount paid under the Act, when such action is brought by

or in the name of an assignee or retailer, or other person paying such amount, or by any person other than the person who has paid such amount, the said provision failing to state whether it has reference to the person making direct payment to the said Board, and in this respect the said act [fol. 28] has not been construed by the Supreme Court of the State of California.

(g) Plaintiff further alleges that section 27 of said act, hereinbefore quoted, requires such taxes, when collected, to be deposited in the State Treasury to the credit of the Retail Sales Tax Fund (not Use Tax Fund) and contains provisions for an appropriation for specified purposes and provides that all fees, taxes, interest and penalties collected under said act in excess of said appropriation for specified purposes shall, upon order of the State Controller, be drawn therefrom for the purpose of making refunds under said act, or be transferred to the general fund of the state; and plaintiff is informed and believes, and therefore alleges, that excepting the amount so appropriated for specified purposes, and amounts drawn for the purpose of making current refunds which are or have become due or payable, all taxes, penalties and interest so collected, are transferred and paid to the general fund of the state; that section 29 of said act provides for the satisfaction of judgment but does not authorize any of the defendants or the State Treasurer of the State of California, to pay such judgments nor is there any express provision in said act requiring the State Controller to pay the same; and no definite procedure is laid down by said act for the payment, collection or enforcement of any judgment for the recovery of such taxes against the State Treasurer, or against the State of California, or against the State Board of Equalization; that said act does not clearly provide an appropriation for the payment of any such judgment nor does it appear that the court's judgment is or shall be final authority for the payment of such judgment, but under the language of said act, refunds, if refunds embrace judgments, can only be made upon order of the State Con- [fol. 29] troller which obviously contemplates a further and separate proceeding to secure his order rather than that the judgment itself shall be authority for the payment of the refund, and in these respects, plaintiff's remedy at law is uncertain, indefinite, incomplete and inadequate.

(h) The remedy at law prescribed in said taxing act or any remedy at law available to the plaintiff under the prohibition and limitation of said act, would necessarily involve a multiplicity of actions because the only remedy available to the plaintiff is the remedy specified in said act by making each tax payment under protest and bringing suit within a short limitation period of sixty days against the State Treasurer of the State of California, to recover such tax; that litigation to finally determine plaintiff's tax liability in the premises would, according to plaintiff's experience and by the common experience in like litigation, known to the court, in all probability involve a period of time of one to two years or possibly a longer period, should such litigation require final decision by the Supreme Court of the United States, which plaintiff believes would be likely, and that in the meantime, plaintiff would be required to make great multitudes of protests and to bring numerous suits at law within sixty days after each tax payment date, and that such multiplicity of suits would involve the plaintiff in much expense, annoyance and injury which would be irreparable and thereby deny to the plaintiff a plain, speedy and adequate remedy at law.

X

Plaintiff is ready, able and willing to furnish a sufficient bond to be approved by this court in such amount and upon such terms and conditions as may be required by this court as a condition for the issuance of any temporary restraining [fol. 30] order or interlocutory injunction which may be granted herein.

Prayer for Relief

Wherefore, in consideration of all of the foregoing, and forasmuch as the plaintiff is without remedy in the premises according to either the laws of the State of California or of the United States, or under the common law and remediable only in equity in this Honorable Court, plaintiff prays as follows:

1. That upon the filing of this complaint and upon the making and filing by plaintiff of a good and sufficient bond, in form and amount approved by this Honorable Court, that there be issued forthwith an order restraining, for the per-

iod allowed by law and pending the hearing of plaintiff's motion for interlocutory injunction, the defendants, and each of them, and all persons acting under their direction or under the direction of either of them, from enforcing, proceeding to enforce or taking any measures to enforce the said California Use Tax Act of 1935, chapter 361, Statutes of 1935 of the State of California, insofar as the defendants, and each of them, may apply or attempt to apply the same to the taxation of tangible personal property purchased and to be purchased by this plaintiff, as aforesaid, from points outside of the State of California and brought into said state for storage, use or other consumption within said state by plaintiff in operating its interstate and intrastate telephone and telegraph business aforesaid, and that said defendants, and each of them, their agents, servants and employees, and all persons acting or claiming to act under their direction or under the direction of any of them, be restrained and enjoined from imposing or collecting on account thereof, any alleged taxes, penalties or interest thereon, or from commencing any prosecution or summary process against the plaintiff on account thereof, or from setting up, assessing or [fol. 31] claiming or proceeding to set up, assess or claim, any such alleged taxes, penalties, interest, claims or demands under said law.

2. To the end that plaintiff may be protected in its said business and property and saved from the hereinbefore described heavy statutory penalties and may not be subjected to a multiplicity of suits which will otherwise result, and may not suffer great and irreparable injury, loss and damage, and may be permitted to pursue and carry on said business without unlawful hindrance and obstructions, and that said property may not be subjected to illegal liens and clouds, plaintiff prays that writs of subpoena in equity issue forthwith to the defendants to this bill, and to each of them, in their respective official capacities, to appear, make and file their answer to this bill, but not under oath, answer under oath being hereby expressly waived, and that, upon due notice thereafter, hearing and determination shall be had herein by three judges of this Honorable Court, one of whom shall be a Circuit Judge as provided by law, or as provided by section 380 of Title 28 of the Code of Laws of the United States (Judicial Code section 266, amended), thereafter, that plaintiff have an interlocutory injunction

against the said defendants, and each of them, their agents, servants and employees, and against all persons acting or claiming to act under their direction, or under the direction of any of them, from proceeding to enforce said California Use Tax Act of 1935, chapter 361, Statutes of 1935, of the State of California, insofar as the defendants, or any of them, may claim that the same applies to the taxation of tangible personal property purchased, and to be purchased, by plaintiff herein as aforesaid, from points outside of the State of California, and brought into said state for storage, [fol. 32] use or other consumption in this state by plaintiff in operating its said interstate and intrastate telephone and telegraph business as aforesaid, and that said defendants, and each of them, their agents, servants and employees, and any and all persons claiming or purporting to act in behalf of any of them or each of them, be restrained and enjoined from imposing or collecting on account thereof, any taxes, penalties or interest thereon, or from commencing any prosecution or suits, or issuing any summary process against the plaintiff on account thereof, or from proceeding or attempting to set up, assess or claim any such taxes, penalties or interest against said plaintiff, pending the final determination of plaintiff's prayer for a permanent injunction.

3. That upon the final hearing and determination upon the merits and the rendition of the final judgment herein by said statutory court of three judges as provided in said section 380 of Title 28 of the Code of Laws of the United States (Judicial Code, section 266, amended), that such Honorable Court order, adjudge and decree that the said California Use Tax Act of 1935, chapter 361, Statutes of 1935, of the State of California, insofar as the same may, by the defendants, be claimed to be applicable to the taxation of tangible personal property, purchased and to be purchased by plaintiff from points outside of the State of California, and brought into said state for storage, use or other consumption in this state by plaintiff in the operation of its said interstate and intrastate telephone and telegraph business, all as hereinbefore related in this bill of complaint, imposes a direct burden on interstate commerce contrary to and in violation of the provisions of Article I, section 8, clause 3, of the Constitution of the United States, and that the imposition and collection of any tax under said law

[fol. 33] against plaintiff in the manner aforesaid, would effectuate a taking of plaintiff's property without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States, and that plaintiff has no adequate remedy at law in the premises and is entitled to a permanent injunction, restraining the enforcement of said law in said respects, and that such Honorable Court further find that said law, in any attempted application, as hereinbefore alleged by defendants, and each of them, against plaintiff, be held null and void and of no effect, upon the grounds, and for the reasons set out and alleged herein, and upon such other grounds and for such other reasons as to this Honorable Court may seem just and reasonable, and may, by this Honorable Court, be found to exist and that a permanent injunction issue herein against said defendants, and each of them, their agents, servants and employees, and any or all persons acting, or claiming to act under their order or at their behest, restraining the enforcement and execution of all of said provisions of said California Use Tax Act of 1935, chapter 361, Statutes of 1935, of the State of California, and any attempt to collect said taxes and penalties thereunder against plaintiff in the manner aforesaid, and that plaintiff have such other or further relief in the premises as the nature and the circumstances of this case may require, and to such Honorable Court may seem meet, just and agreeable in equity.

Pillsbury, Madison & Sutro, Attorneys for Plaintiff.

[fol. 34] *Duly sworn to by C. E. Fleager. Jurat omitted in printing.*

[fol. 35] [File endorsement omitted.]

[fol. 36] In United States District Court

[Title omitted]

Motion for Temporary Restraining Order and Application for Hearing for Interlocutory Injunction—Filed August 11, 1936

Comes now the plaintiff and, upon its verified bill of [fol. 37] complaint heretofore duly filed herein, files this,

its motion, pursuant to section 380 of the Code of Laws of the United States (Judicial Code, sec. 266, amended), for the issuance of a temporary restraining order, upon the grounds and in the manner set forth in said bill of complaint, to prevent immediate, great and irreparable injury, loss and damage, which otherwise would result to the plaintiff, before the hearing and determination of the application for an interlocutory injunction herein may be had, or notice thereof be served, particularly because of plaintiff's statutory liability to pay, on or before the 14th day of August, 1936, the taxes alleged by defendants to be due from plaintiff under certain provisions of the California Use Tax Act of 1935, chapter 361, Statutes of 1935, of the State of California, claimed herein to be unconstitutional, illegal and void; and because, in failing to so pay said taxes on or before said due date, plaintiff would become immediately liable for the gross amount of said taxes and by way of statutory penalty for a sum in addition to said total amount of said taxes, equal to 10 per cent thereof, and a further additional sum equal to one-half of one per cent thereof, calculated upon the total amount of said taxes from the day upon which said taxes become due and payable to the date of payment thereof; and plaintiff further makes this its application to this court for a hearing on this cause for an interlocutory injunction, in accordance with the prayer of said bill of complaint and in accordance with section 380 of the Code of Laws of the United States (Judicial Code, sec. 266, amended).

Dated August 11, 1936.

Pillsbury, Madison & Sutro, Attorneys for Plaintiff.

[File endorsement omitted.]

[fol. 38] In United States District Court

[Title omitted]

Order Noticing Necessity for Other Judges, Issuing Temporary Restraining Orders and Order to Show Cause—Filed August 12, 1936

The verified bill of complaint in the above entitled cause [fol. 39] having been presented, and a bond conditioned in

the sum of Twenty Thousand & No./100 dollars ($20,000.00), the amount fixed by this court, having been executed and the same having been approved by the court as to form and sufficiency, said petition is hereby approved.

The constitutionality of an act of the Legislature of the State of California is attacked in said petition, calling for the determination of whether or not an interlocutory injunction shall be issued, and a court consisting of three United States judges, one of whom shall be a Circuit Judge, under section 380, Title 28, of the Code of Laws of the United States (Judicial Code, sec. 266, amended) is required. The facts alleged in the petition show that immediate and irreparable injury, loss and damage will result to the plaintiff before notice can be served and a hearing had thereon. It appearing to the court that the taxes sought to be enjoined herein are due and payable on or before the 14th day of August, 1936, and unless said taxes are paid on said day or the collection thereof be enjoined by a temporary restraining order, said plaintiff will be assessed a penalty of 10 per cent of the amount of such taxes, together with interest on said amount. and that the enforcement of such penalties and interest would work an immediate, harsh and irreparable injury to the plaintiff. This restraining order is therefore granted without notice, under the provisions of section 381, Title 28 of said Code of Laws of the United States (Judicial Code, sec. 266, amended).

The defendants John C. Corbett, Fred E. Stewart, Richard E. Collins, Ray L. Edgar and Ray L. Riley, as members of the State Board of Equalization of the State of California, State Board of Equalization of the State of California, and U. S. Webb, the Attorney General of the State of California, their assistants, agents and employees are hereby restrained from enforcing, proceeding to enforce or taking [fol. 40] any measures to enforce the said California Use Tax Act of 1935, chapter 361 of the Statutes of 1935, of the State of California, insofar as the defendants and each of them may apply or attempt to apply the same to the taxation of tangible personal property purchased and to be purchased by plaintiff herein, from points outside of the State of California and brought into said state for storage, use or other consumption within said state by plaintiff in conducting its interstate and intrastate telephone and telegraph business, and that said defendants, and each of them,

their agents, servants and employees, and all persons acting or claiming to act under their direction or under the direction of either of them, be, and they are hereby, restrained and enjoined from imposing or collecting on account thereof any alleged taxes, penalties or interest thereon, or from commencing any prosecution or summary process against the plaintiff on account thereof, or from setting up, assessing or claiming or proceeding to set up, assess or claim any such taxes, penalties, interest, claims or demands under said law as in said bill of complaint specifically set forth.

Let the defendants, and each of them, show cause before the court consisting of three judges as provided by said section 380, Title 28 of the Code of Laws of the United States (Judicial Code, sec. 266, amended) at the courtroom of said court at San Francisco, California on August 22, 1936, at 10:00 o'clock in the forenoon of said day, if any they, or either of them, have, why a temporary injunction should not issue as prayed for in the bill of complaint.

Let subpoenas issue directed to the defendants, and each of them, requiring them to appear and answer, as provided by the statute.

Let a copy of the bill of complaint in the above cause and a copy of this order and a subpoena be served upon Honorable Frank F. Merriam, Governor of the State of Cali-
[fol. 41] fornia, and Honorable U. S. Webb, Attorney General of the State of California.

This order signed at San Francisco, California, on the 12th day of August, 1936 at 10 o'clock A. M.

Michael J. Roche, United States District Judge.

[File endorsement omitted.]

[fol. 42] IN UNITED STATES DISTRICT COURT

RETURN ON SERVICE OF WRIT—Filed August 19, 1936

UNITED STATES OF AMERICA,
Northern District of California, ss:

I hereby certify and return that I served the annexed Subpoena in Equity on Frank F. Merriam, Governor of the State of California by handing to and leaving a true and

correct copy thereof together with copy of complaint with Francis Cochran, Secretary to the Frank F. Merriam personally at Sacramento, Calif., in said District on the 14th day of August, A. D. 1936.

George Vice, U. S. Marshal, by Hayden Saunders, Deputy.

[File endorsement omitted.]

[fol. 42½] IN UNITED STATES DISTRICT COURT

RETURN ON SERVICE OF WRIT—Filed August 19. 1936

UNITED STATES OF AMERICA,
Northern District of California, ss:

I hereby certify and return that I served the annexed Order to Show Cause on Frank F. Merriam, Governor of the State of California by handing to and leaving a true and correct copy thereof with Francis Cochran, Secretary to Frank F. Merriam personally at Sacramento, Calif., in said District on the 14th day of August, A. D. 1936.

George Vice, U. S. Marshal, by Hayden Saunders. Deputy.

[File endorsement omitted.]

[fol. 43] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION TO DISMISS BILL OF COMPLAINT—Filed April 7, 1937

Come Now the defendants in the above entitled cause and move the court to dismiss the plaintiff's bill of complaint on the following grounds:

I

That the bill of complaint is without equity and the juris-
[fol. 44] diction of the Federal Court does not affirmatively appear upon the face of the bill.

II

That it does not appear that the plaintiff is without adequate remedy at law, and the statement to the contrary in paragraph X of the bill of complaint is without foundation of law in view of Sec. 29 of the California Use Tax Act of 1935 providing for an action to recover such tax paid under protest.

III

That no question of public interest or necessity appears on the face of the bill and it does not appear that irreparable injury or damage will follow if the bill of injunction is not granted.

IV

That the said bill of complaint does not state facts sufficient to constitute a cause of action against defendants or either of them or to entitle plaintiff to the relief prayed for or to any relief.

Wherefore, defendants pray that the order of the court heretofore entered herein granting a temporary injunction be set aside; that said application for temporary injunction be denied and that said bill of complaint be dismissed.

Dated: April 6, 1937.

U. S. Webb, Attorney General; H. H. Linney, Deputy Attorney General; James J. Arditto, Deputy Attorney General, Attorneys for Defendants.

[fol. 45] Memorandum of Points and Authorities in Support of Motion to Dismiss

California Use Tax Act, Stats. of California, 1935, p. 1297;
Brown v. Maryland, 12 Wheat. 419;
Edelman v. Boeing Air Transport Co., 289 U. S. 249;
Gregg Dyeing Co. v. Query, 286 U. S. 472;
Jensen v. Henneford, — Wash. —, 53 Pac. (2d) 607;
Monamotor Oil Co. v. Johnson, 292 U. S. 86;
Pacific Tel. & Tel. Co. v. Tax Commission, — U. S. —, 56 S. C. R.
Sonneborn Bros. v. Cureton, 262 U. S. 506;

Vancouver Oil Co. v. Henneford, 183 Wash. 317, 49 Pac. (2d) 14;

Henneford v. Silas Mason Co., — U. S. —, decided March 29, 1937.

U. S. Webb, Attorney General; H. H. Linney, Deputy Attorney General; James J. Arditto, Deputy Attorney General, Attorneys for Defendants.

[File endorsement omitted.]

[fol. 46] Affidavit of Service by Mail

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

The Undersigned being duly sworn, says: I am a citizen of the United States, over the age of eighteen years, a resident of the City and County of San Francisco, State of California, and not a party to the above entitled action; Pillsbury, Madison & Sutro the attorneys of record of the above named plaintiff maintain an office at Standard Oil Building in San Francisco County of San Francisco, State of California; and between said two places there is a regular communication by mail; on the 7th day of April, 1937, I served a true copy of the Motion to Dismiss Bill of Complaint, Memorandum of Points & Authorities and Notice herein, to the original of which this affidavit is attached, on said last-named attorneys of record by depositing said copy on said date in the post office at the said City and County of San Francisco enclosed in a sealed envelope addressed to said attorneys at the office thereof, and prepaying the postage thereon.

Virginia Cooke.

Subscribed and sworn to before me, this 7th day of April, 1937. James J. Arditto, Deputy Attorney General.

(Endorsed:) Filed Apr. 7, 1937.

[fol. 47] IN UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

In Equity. No. 4067-R

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a Corporation, Plaintiff,

v.

JOHN C. CORBETT, FRED E. STEWART, RICHARD E. COLLINS, Ray L. Edgar and Ray L. Riley, as Members of the State Board of Equalization of the State of California; State Board of Equalization of the State of California, and U. S. Webb, the Attorney General of the State of California, Defendants

Before Denman, Circuit Judge, and St. Sure and Roche, District Judges

[fol. 48] OPINION—Filed September 10, 1937

DENMAN, Circuit Judge:

Plaintiff, Pacific Telephone and Telegraph Company, brings a bill for injunction against the defendants, state officers, to restrain the latters' threatened enforcement of the California Use Tax (Cal. Stats., 1935, ch. 361) upon property purchased by plaintiff outside the state and shipped within for use in its communication system which system performs inextricably intermingled interstate and intrastate commerce functions.

The case was heard together with that of Southern Pacific Company v. Corbett, Equity No. 4055-S, and the material issues are identical with those presented and decided in that case. Very little separate statement is required.

The property purchased outside the state by the plaintiff is acquired from Western Electric Company, plaintiff in case 4066-L (Equity), which is a retailer maintaining a place of business in California. The bill of complaint recites allegations substantially identical with those in the Southern Pacific case as to the allocation and dedication of the property upon its purchase to interstate commerce uses, as to the purchasing, financing and accounting being carried on under rules of the Interstate Commerce Commission, and as to any "keeping or retention" of the property within the state being in itself a use in interstate commerce.

The complaint thus describes the property:

"A part of said property was purchased by plaintiff and shipped to it to various points in the State of California as

standby telephone and telegraph facilities of plaintiff for [fol. 49] its said interstate and intrastate telephone and telegraph business; and said part of said property was held and used by plaintiff as a part of its said interstate and intrastate telephone and telegraph system as such standby facilities as required in the performance of its obligations to the public as a public service company, and in the conduct of its said interstate and intrastate telephone and telegraph business * * *.

"The remaining part of said property consisted of central office switchboards, large private branch exchange switchboards, telephone cables and components of telephone and telegraph lines purchased by plaintiff and shipped to it from time to time, under respective specific orders of plaintiff, to various points in the State of California for the immediate installation and use by plaintiff forthwith upon its shipment as part of the said interstate and intrastate telephone and telegraph system of plaintiff and for use exclusively by plaintiff for its said interstate and intrastate telephone and telegraph business * * *.

"Because of the large extent of plaintiff's telephone and telegraph system so operated, it is necessary in the interest of business economy and efficient public service for plaintiff to purchase much of its supplies in large quantities in anticipation of current and recurring needs and to effect deliveries thereof to the extent reasonably possible in carload lots to the points of distribution and use, and it is necessary to have supplies to meet current requirements distributed over the entire telephone and telegraph system in quantities and at the times necessary to anticipate regular current requirements as well as the regular emergency requirements, and to have such reserves in quantities necessary to meet constantly fluctuating demands and emergencies which result from changes in the public demand for service and the repairs which from time to time unavoidably arise from the destruction of property by reason of fires, storms and other weather conditions and unavoidable casualties which arise in connection with conducting such telephone and telegraph commerce and business * * *.

"All of said articles so purchased by plaintiff from said Western Electric Company, Incorporated, were and are especially designed for use in the operation and maintenance of said telephone and telegraph system, are peculiarly adapted to telephone and telegraph uses as aforesaid and are not suitable for any other use."

It is plain from the allegations of the complaint, admitted by the motion to dismiss, that the property in question here was partly "standby" or reserve material and partly material purchased for existing maintenance needs, precisely as [fol. 50] was the situation in the Southern Pacific case. Here, as in that case, the "keeping", "retention", or "storage" of the material was a use in interstate commerce preparatory to a subsequent use after physical integration in the plant.

For the reasons set out in the Southern Pacific case, the motion to dismiss herein is denied, and an interlocutory injunction granted. Findings of fact, conclusions of law and decree to be submitted by plaintiff.

William Denman, U. S. Circuit Judge. Michael J. Roche, U. S. District Judge. A. F. St. Sure, U. S. District Judge.

[File endorsement omitted.]

[fol. 51] In United States District Court, Northern District of California, Southern Division

In Equity. No. 4055-R

Southern Pacific Company, a Corporation, Plaintiff,

v.

John C. Corbett, Fred E. Stewart, Richard E. Collins, Ray L. Edgar, and Ray L. Riley, as Members of the State Board of Equalization of the State of California; State Board of Equalization of the State of California, and U. S. Webb, the Attorney General of the State of California, Defendants

Before Denman, Circuit Judge, and St. Sure and Roche, District Judges

[fol. 52] Opinion—Filed September 10, 1937

Denman, Circuit Judge:

This case involves the question whether the necessary incidental storage of materials bought by an interstate railway company for installation in the service of repair and replace-

ment under a predetermined plan for the maintenance and improvement of the service, is a use in interstate commerce. The State of California, under a general tax law applying to all persons storing within the state goods purchased without the state upon which goods no state sales tax has been paid, seeks to have included in the large number of persons subject to the statute those engaged in commerce among the states.

By the logically immediate process of federal law, the tax on these materials stored for current repairs, operation, etc., of the interstate railway is translated into the passenger fares and merchandise carriage rates of all the passengers and shippers of the thirty or forty states shipping into and out of California.[1] The persons interested in and affected by our decision, though not appearing here, are those upon whom the tax will certainly fall. Though not litigants, their interest transcends that of the corporation and its stockholders.

The Constitution gives to Congress the regulation of the management of interstate railways. If the court decides that this storage of materials is not a use in interstate commerce, then the Congress may not declare it to be or regulate it as such a use. If Congress desires to require the railways to keep in storage for current use such necessary materials it can do so only by invading intrastate activities under an [fol. 53] extension of the principles laid down in Nat. Labor Rel. Board v. Jones & Laughlin Steel Co., 81 L. ed. 563 and Edwards v. U. S. (C. C. A. 9) No. 8386, decided July 22, 1937. The delicate question of the boundary between state and federal power would seem to make proper the presence of the Attorney General of the United States, although the recent legislation requires the opportunity for his presence only where there is presented the constitutionality of a federal statute.[2]

This is a suit in equity brought before a court of three judges pursuant to section 266 of the Judicial Code [3] seeking

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[1] Taxes are, of course, taken into account in determining a carrier's operating expenses or property valuation for rate fixing purposes. See N. Y. etc., Ry., 97 I. C. C. 273; Great North. R. Co., 133 I. C. C. 1.

[2] H. R. 2260, approved August 25, 1937.

[3] Act of June 18, 1910, 36 Stat. 557, 28 U. S. C. A. sec. 380.

to have enjoined pendente lite and permanently the enforcement of a statute of the State of California, namely the Use Tax Act of 1935.[4] The defendants are the California State Board of Equalization, the individual members of the board, and the Attorney General of the state. The injunctions are sought on the grounds that the enforcement of the tax in this case will unduly burden the plaintiff's interstate commerce business contrary to the provisions of Article I, section 8, of the Federal Constitution, and that there exists for the plaintiff no adequate remedy at law.

A temporary restraining order against the enforcement of the tax has been issued. The matter is now before this court on the plaintiff's prayer for interlocutory injunction and the defendants' motion to dismiss the bill. In support [fol. 54] of their motion to dismiss the defendants contend that the plaintiff has an adequate remedy at law and that the bill states no ground of relief whatsoever.

Under the assailed tax measure, later considered in detail, the defendants seek to impose against the Southern Pacific Company an excise tax upon the "storage" or "use" of personal property purchased by the company without the State of California, shipped to points within the state and there held, in accordance with predetermined plans, to be installed and made an active part of the company's tangible equipment used within the state for purposes of its inextricably interwoven interstate and intrastate commerce.

The Southern Pacific Company is a corporation of Kentucky engaged as a common carrier by railroad in seven states, including California. Half of its more than 8,000 total mileage is in California. Its gross operating revenue for the calendar year 1935 was more than $124,000,000 of which $63,000,000 was earned on California business. Of this latter figure over $34,000,000 was attributable to interstate commerce.

The specific personal property against the use of which the excise is sought to be enforced consists of a great variety of material necessary for the conduct of plaintiff's intermingled interstate and intrastate business. A portion of it was purchased for integration in plaintiff's railroad system pursuant to an existing maintenance program for the year 1936. The remainder was acquired to have on hand for the recurring demands of maintenance and emergency require-

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[4] Cal. Stats., 1935, ch. 361.

ments. Among other articles the property purchased included rails, frogs, switches, valve oil, lumber, stationery [fol. 55] and tools. The complaint alleges that the greater portion was specifically designed for use in the operation, maintenance and repair of the road, or "peculiarly adapted to railroad uses * * * and * * * not suitable for any other use." The articles were all required for the efficient and economical conduct of the road.

Concerning the interstate commerce purposes of these purchases, the complaint alleges:

"Said purchases were made by the plaintiff through the use of its operating capital consisting of money or current assets definitely devoted to the service of transportation, or through the credit of said plaintiff as a railroad engaged in the service of transportation and upon the purchase of said materials and the payment therefor, the expenses therefor are in due course charged into the operating expenses of said carrier to the appropriate accounts for operation, maintenance or repairs, according to the accounting rules and regulations prescribed for railroads engaged in interstate commerce under the provisions and requirements of the Interstate Commerce Act, and that all of said items of tangible personal property so purchased by the plaintiff were devoted to the service of transportation immediately upon their purchase and that upon the purchase of said articles they immediately became a necessary and indispensible part of working capital, material, supplies, equipment and instrumentalities for the operation of said railroad and the said articles and each and all of them became, were and are instrumentalities used indiscriminately and inseparably in the operation, maintenance and repair of plaintiff's railroad for conducting interstate transportation and intrastate transportation from the time the same were purchased therefor, and any storage, use or consumption thereof, which occurred within the State of California cannot be separated or segregated as between intrastate and interstate transportation, the said railroad contemporaneously carrying by means of the same organization and facilities, both intrastate and interstate commerce and said items and materials being from the time of purchase outside the State of California inextricably devoted to and used in service of both classes of commerce."

And further:

"• • • that prior to any keeping or retention of said materials within the State of California, said materials were allocated and dedicated to sole and exclusive use in interstate commerce and any keeping or retention thereof within the State of California was and is an inseparable part of the use of said materials and each item thereof in interstate commerce."

The gravamen of these allegations is thus perceived to be that any "keeping" or "storage" of the property within [fol. 56] the state is a use of the property in interstate commerce preparatory to a subsequent use by way of actual physical consumption.

During the three months ending June 30, 1936, the property described in the complaint, purchased outside of and shipped into California, amounted to $1,590,190.62. The use tax assessed on this material totals $47,705.72.

The Act in question imposes an excise tax of three per cent of the sale price upon the storage, use or other consumption of tangible personal property within the state.[5] Leaving out of account the alleged character of the properties as instrumentalities of interstate commerce, the plaintiff's exercise of uses incidental to ownership over them within the state comes within the broad definitions of the statute.[6]

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[5] Cal. Stats., 1935, ch. 361.

"Sec. 3. An excise tax is hereby imposed on the storage, use or other consumption in this State of tangible personal property purchased from a retailer on or after July 1, 1935, for storage, use or other consumption in this State at the rate of three per cent of the sales price of such property.

"Every person storing, using or otherwise consuming in this State tangible personal property purchased from a retailer shall be liable for the tax imposed by this act • • •."

[6] Sec. 2 • • •

"(a) 'Storage' means and includes any keeping or retention in this State for any purpose except sale in the regular course of business of tangible personal property purchased from a retailer.

"(b) 'Use' means and includes the exercise of any right or power over tangible personal property incident to the ownership of that property, except that it shall not include the sale of that property in the regular course of business."

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[fol. 57] Exempt from the operation of the tax are materials protected from excise by the Federal or State Constitution, and material upon which the California three per cent sales tax has been paid.[7] Thus it is observed that the use tax is complementary to the sales tax, being designed to reach purchasers who acquire personal property in other states.

If the property taxed is purchased from a retailer maintaining a place of business within the State of California, the purchaser pays the tax to the retailer and the latter pays it to the State Board of Equalization. If the retailer maintains no place of business within the state, the purchaser pays the board directly. In either case returns and payments are due quarterly (sections 6, 7).

In the event of non-payment the board may file with any county clerk a certificate showing due determination of the tax and the failure to pay. Upon such filing the county clerk is required to enter a judgment for the state against the delinquent. The judgment is subject to execution in the usual manner, and in addition it becomes a lien upon any real property owned by the delinquent within the county (section 20). In addition to this procedure, the board is empowered [fol. 58] to bring an action in any court of competent jurisdiction to recover the tax at any time within three years after it becomes due (section 28).

The taxpayer is afforded but one remedy to recover taxes illegally exacted. He may pay under protest and bring an action in the state court.[8]

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[7] "Sec. 4. The storage, use or other consumption in this State of the following tangible personal property is hereby specifically exempted from the tax imposed by this act:

"(a) Property, the gross receipts from the sale of which are required to be included in the measure of the tax imposed by Chapter 1020, Statutes of 1933 and any amendments made or which may be made thereto.

"(b) Property, the storage, use or other consumption of which this State is prohibited from taxing under the Constitution or laws of the United States of America or under the Constitution of this State."

* * * * * * *

[8] "Sec. 29. No injunction or writ of mandate or other legal or equitable process shall issue in any suit, action or proceeding in any court against this State or against any officer

[fol. 59] The bill alleges that the defendants will, unless restrained, take summary action to collect the more than $40,000 alleged to be due upon the property purchased during the quarter ending June 30, 1936. It further states that like or greater amounts of property will be purchased during quarter years to come. Temporary and permanent injunctions are asked against future exactions as well as the claim for the second quarter of 1936.

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thereof to prevent or enjoin under this act the collection of any tax or any amount of tax herein required to be collected; but after payment of any such tax or any such amount of tax herein required to be collected under protest, duly verified and setting forth the grounds of objection to the legality thereof, the retailer or person making the payment may bring an action against the State Treasurer in a court of competent jurisdiction in the county of Sacramento for the recovery of the amount paid under protest. No such action may be instituted more than sixty days after the tax or the amount herein required to be collected and paid to the State becomes due and payable, and failure to bring suit within said sixty days shall constitute waiver of any and all demands against the State on account of alleged overpayments hereunder. No grounds of illegality shall be considered by the court other than those set forth in the protest filed at the time of payment of the tax or the amount herein required to be collected and paid to the State.

"If in any such action judgment is rendered for the plaintiff, the amount of the judgment shall first be credited on any taxes or amounts due from the plaintiff under this act, and the balance of the judgment shall be refunded to the plaintiff. In any such judgment, interest shall be allowed at the rate of six per cent per annum upon the amount found to have been illegally collected from the date of payment of such amount to the date of allowance of credit on account of such judgment or to a date preceding the date of the refund warrant by not more than thirty days, such date to be determined by the Controller.

"In no case shall any judgment be rendered in favor of the plaintiff in any action brought against the State Treasurer to recover any amount paid hereunder, when such action is brought by or in the name of an assignee of the retailer or other person paying said amount, or by any person other than the person who has paid such amount."

The defendants' motion to dismiss raises questions which have narrowed to two: (A) Does there exist for the plaintiff an adequate remedy at law? (B) Is the threatened exaction void for repugnance to the Federal Constitution?

(A) We hold that the plaintiff has no adequate remedy at law.

Plaintiff presents several reasons to support its contention that, if the tax is unconstitutional, it has no adequate legal remedy. It will be necessary to consider only one of the grounds urged, which ground, in our opinion, is controlling.

The Use Tax Act provides but one forum for the recovery by suit at law of taxes paid under protest (Section 29, note 8, supra). This forum is "a court of competent jurisdiction in the county of Sacramento". Obviously this provision contemplates a suit only in the state court.

When a bill in equity is brought in a federal court, the test of the adequacy or lack of adequacy of the remedy at law is the legal remedy afforded in the federal court. Where no legal remedy exists in that forum, the remedy at law is inadequate. This conclusion is impelled by a consideration of the nature of the right to sue in the federal courts. It is a substantial constitutional right. Arrowsmith v. Gleason, 129 U. S. 86. When one has a cause of action at law, and [fol. 50] there exist requisites of federal jurisdiction, his remedy at law is the right to sue in the state or federal tribunal at his election. To deprive him of this choice materially impairs the completeness and adequacy of his remedy.

In Smyth v. Ames, 169 U. S. 466, 515, 516, 517, a statute of Nebraska set up a board to prescribe maximum railroad rates. Any railroad deeming itself aggrieved was permitted to bring an action in the supreme court of the state to show that the rates fixed were unjust. If the state court sustained the contention of the railroad it was authorized to issue an appropriate order to the board requiring a correction of the inequity.

Suit was brought by a railroad company in the United States District Court to enjoin the enforcement of the statute. The Supreme Court of the United States held that a case of equity jurisdiction was made out, saying:

"• • • The adequacy or inadequacy of a remedy at law for the protection of the rights of one entitled upon any

ground to invoke the powers of a Federal Court, is not to be conclusively determined by the statutes of the particular State in which suit may be brought. One who is entitled to sue in the Federal Circuit Court may invoke its jurisdiction in equity whenever the established principles and rules of equity permit such a suit in that court; and he cannot be deprived of that right by reason of his being allowed to sue at law in a state court on the same cause of action. * * * 'A State cannot tie up a citizen of another State, having property rights within its territory invaded by unauthorized acts of its own officers, to suits for redress in its own courts'."

In Chicago, B. & Q. Ry. v. Osborne, 265 U. S. 14, 16, a railroad company brought suit in the federal court to restrain the collection of taxes levied by the State of Nebraska which taxes were alleged to be unjustly discriminatory. The state law provided a remedy by writ of error to the Board of Equalization from the supreme court of the state. In holding that the taxpayer was authorized to seek federal equity relief, the United States Supreme Court said:

[fol. 61] "If an action to recover the payment were allowed, the suit might be brought in the Courts of the United States, under the usual conditions, as well as in those of the State. * * *. But the writ of error, of course, can be sued out only in the State, and a remedy in the State Courts only has been held not to be enough. Smyth v. Ames, 169 U. S. 466, 516. St. Louis-San Francisco Ry. Co. v. McElwain, 253 Fed. 123, 136. Franklin v. Nevada-California Power Co., 264 Fed. 643, 645."

The principle was reaffirmed in Risty v. Chicago, etc. Ry. Co., 270 U. S. 378, 388:

"* * * the test of equity jurisdiction in a federal court is the inadequacy of the remedy on the law side of that court and not the inadequacy of the remedies afforded by the state courts. Smyth v. Ames, 169 U. S. 466; Chicago B. & Q. R. Co. v. Osborne, supra."

(B) We hold that the tax sought to be levied upon the plaintiff is an unconstitutional burden on interstate commerce.

The tax in question is laid upon the exercise of certain rights of ownership over personal property; these rights

being enumerated in the broad statutory definitions of "use" and "storage" (footnote 6, supra). It is not an ad valorem property tax, admittedly valid although the property consist of instrumentalities of interstate commerce, nor is it a tax on the privilege of doing an intrastate business, upheld in Pacific Telephone Co. v. Tax Commission, 297 U. S. 403.

The plaintiff does not urge constitutional objections other than the contention that the enforcement here will unduly burden interstate commerce. And even under this heading there can be no objection to the excise on the ground that the materials were imported into the state before the incidence of the tax. Henneford v. Silas Mason Co., 300 U. S. 577.

The question narrows, then, to the issue whether at any time after their importation into the State of California, [fol. 62] the materials purchased by the plaintiff were not in use in interstate commerce. If they at all times were in actual interstate commerce use or intermixed interstate-intrastate commerce use, that use cannot be subjected to a state tax. It is well settled that such a tax constitutes a forbidden burden on interstate commerce. Helson and Randolph v. Kentucky, 279 U. S. 245, 249, 252; Bingaman v. Golden Eagle Western Lines, 297 U. S. 626, 628; Cooney v. Mountain States Tel. Co., 294 U. S. 384, 393.

By their motion to dismiss the defendants admit the facts pleaded in the complaint. That is, they admit that the items of property they seek to tax "were devoted to the service of transportation immediately upon their purchase," that their financing and accounting was carried on "according to the accounting rules and regulations prescribed for railroads engaged in interstate commerce under the provisions and requirements of the Interstate Commerce Act," that each item was an essential and vital factor in the maintenance and repair of plaintiff's interstate commerce plant, that at all times since their purchase "said materials were allocated and dedicated to sole and exclusive use in interstate commerce and any keeping or retention thereof within the State of California was and is an inseparable part of the use of said materials and each item thereof in interstate commerce."

Thus defendants admit the factual contention that plaintiff's use of the purchased materials at all times since their purchase was a vital use in interstate commerce. Never-

theless they urge that as a matter of law the only interstate commerce use which is free from state taxation is use by way of actual physical consumption or use occurring after the materials have been installed in the operating plant, such as the gasoline being consumed in the Helson and [fol. 63] Bingaman cases, or the telephone instruments actually installed in the Cooney case.

The statute specifically exempts property protected from taxation by the Constitution. While this does no more than declare what already is the law, it demonstrates the solicitude of the legislature toward the recognition of constitutional limitations. It indicates that when the legislature defined taxable storage and use it was anxious to insure that interstate commerce use would be protected. Yet defendants would have the statute read:

"(a) 'Storage' means and includes any keeping or retention in the State * * * of tangible personal property (when such keeping or retention is an inseparable part of the use of such property in interstate commerce, when such property is allocated and dedicated to interstate commerce from the moment of its purchase and is recognized by the Federal Government through the Interstate Commerce Commission as a portion of the capital of the taxpayer used in interstate commerce) * * *."

"(b) 'Use' means and includes the exercise of any right or power over tangible personal property incident to the ownership of that property (which exercise of right or power is a part of the use of such property in interstate commerce prior to a subsequent use by way of consumption) * * *."

We do not believe the statute is thus to be construed. However, if this is the meaning of the act, then we are forced to conclude that it is an unconstitutional exertion of power by the state legislature.

This conclusion is impelled by a realistic approach to the facts presented by the bill. In Pacific Telephone Co. v. Tax Commission, 297 U. S. 403, 413, the Supreme Court, dealing with the validity of a state tax, repeated its earlier admonition in Gregg Dyeing Co. v. Query, 286 U. S. 472, 480: "The question of constitutional validity is not to be determined by artificial standards."

Whether a use in storage for current consumption is a [fol. 64] use in interstate commerce is a question of ultimate

fact. Here the court must find or refuse to find this ultimate fact upon the admitted facts and upon those of which it takes judicial notice. It cannot use "artificial standards." It must consider actual business and industrial concepts.

The question is analogous to that presented by a merchandising company's stock for sales in the current season, stored for daily supply of its counters. If such storage is a use other than a merchandising use, what use is it? Or take the case of a canner's stock of cans stored in his plant at the beginning of a fruit season from which stock there is daily withdrawn those required for the arriving fruit. What sort of use is the storage of these cans, if not a canning use?

Certainly any merchandiser or canner or other industrialist or business man would consider it a glaring example of the application of an "artificial standard" to say that such a storage for current consumption was not a use in the business or industry in question. He might well answer: What other business have I in which that storage has any use?

When we view realistically the facts set out in the bill, supplemented with our judicial notice of the practical necessities of a large transportation enterprise, we clearly per- [fol. 65] ceive that this property is used in interstate commerce from the time of its purchase.

Consider first the property purchased for and devoted to a sole, fixed and predetermined use in an existing interstate commerce maintenance program. The storage of such property is a use which is as integral a part of the interstate commerce project as are the rails over which interstate trains are actually running. It is the definite predetermined character of its purpose that makes the storage of these purchased articles of equipment as vital to the entire plant before installation as well as afterwards. The situation differs materially from that of the purchase of a body of goods a part or all of which will, in the ordinary turn of events, be used in the future in interstate commerce operations.[9]

It is no answer to say that the plaintiff might change its intention after purchasing and use the property for some purely intrastate purpose not intended at the time of pur-

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[9]See Nashville, Chattanooga & St. Louis Ry. v. Wallace, infra.

chase. Granting that such legal right exists, it would be as persuasive to argue that the state might tax the use of an interstate locomotive in operation on the theory that its owner is privileged to use it at any time for a purely local purpose. The question concerns not what the plaintiff might do; it concerns, rather, what the plaintiff is actually doing.

Likewise, property purchased for the sole, fixed and predetermined purpose of serving as "standby" or reserve [fol. 66] equipment in an interstate commerce plant is employed in interstate commerce from the time of its purchase. It is almost axiomatic that the far flung system of an interstate railroad cannot be conducted without the presence of reserve supplies. Unpredictable events requiring replacement and repair are of daily occurrence. A flood washes out a section of track. Can it rationally be argued that the rails and ties held in readiness against this emergency are not an integral portion of the company's interstate commerce equipment? One might as well contend that a derail switch is not in use in interstate commerce until an emergency requires it to function.

The distinction which the defendants would have us make between property before and property after installation, whether purchased for an existing necessity or as reserve, strikes us as no more cogent than the argument that the use of a railway station could be taxed because for long periods no interstate trains stop in front of it and no interstate passengers or freight make use of it; or the argument that the use of a locomotive is taxable by the state during the period in which it is standing idle between interstate trips, or that the telephones held non taxable in the Cooney case, supra, should be subject to excise because there were long periods when no interstate calls were being made on any one of them.

In short, a use by way of storage or retention of materials can be fully as vital to interstate commerce as a subsequent use by way of consumption or after installation. A somewhat similar situation is presented by a require- [fol. 67] ment of pilotage fees which a vessel leaving or entering a harbor must render to a pilot whether or not it avails itself of his services. Pacific Mail S. S. Co. v. Joliffe, 2 Wall. 450.

The Federal Government has recognized the interstate character of the use of materials like those described in the complaint through regulations (having the force of law) issued by an administrative agency, the Interstate Commerce Commission.[10] We do not believe that the California Legislature, specifically declaring in section 4 of the Act (note 7, supra) its intention to recognize the constitional prohibition against the taxation of the use of materials in interstate commerce, intended nevertheless to subject to taxation the use of materials not only set apart by the carrier for interstate commerce uses, but recognized as so devoted by the Federal Government.

In a case calling for the determination of whether a particular use of materials is an intrastate or an interstate use, we touch upon the boundary between state and federal power. The requirement of materials for current repairs [fol. 68] and replacement is so obviously a necessity for interstate commerce that no legislation has been needed to compel it. However, the Congress could well pass a statute requiring that:

"Interstate carriers shall purchase and store for current repairs necessary materials for the efficient conduct of their railways, said *usage* by said carriers of said materials awaiting current installation to be maintained in places convenient to the places of their installation."

To illustrate how our decision in this case may affect the scope of federal power, we assume that the above statute

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[10] I. C. C. classification of accounts for steam railroads:
"716. Material and Supplies.

"This account shall include the balances representing the cost, less depreciation, if any, of all unapplied material such as road and shop materials, articles in process of manufacture by the accounting company, fuel, stationery, and dining car and other supplies. In determining the cost of material and supplies suitable allowances shall be made for any discounts allowed in the purchase thereof.

"NOTE.—Balances representing the cost of unapplied construction material and supplies located at the point of use, which have been purchased for projected new roads and extensions, are provided for in road and equipment account No. 47, 'Unapplied construction material and supplies'."

has been passed. In opposition to it we have the instant state use tax act which the defendants would have read:

"(a) 'Storage' means and includes any keeping or retention in this State for any purpose * * * of tangible personal property (including materials purchased and stored by interstate carriers for current repairs and maintenance necessary for the efficient conduct of their railways) * * *."

The power delegated to Congress under the commerce clause is paramount to the reserved power of the state, when the two come in conflict. Minnesota Rate Cases, 230 U. S. 352, 399; National Labor Relations Board v. Santa Cruz Fruit Packing Co., (C. C. A. 9) decided July 31, 1937. Hence in such a conflict of opposing authority presented by the statutes pictured above, this court would be required to indulge every presumption in favor of the Congressional determination that the usage of materials described in both statutes was a use in interstate commerce. Ogden v. Saunders, 12 Wheat. 213, 269. Such determination being a reasonable hypothesis, we would be required to accept it as true. Against it the state statute would necessarily fall as invalid. It is because of this possible conflict that we cannot [fol. 69] apply the Bushrod Washington doctrine of Ogden v. Saunders to the state tax legislation challenged in this case.

Conversely, when the state acts within the scope of its reserved powers every presumption is indulged in favor of the validity of its legislation. Such was the case in Pacific Gas & Electric Co. v. Sacramento Municipal Utility District, No. 8500, recently decided by the Circuit Court of Appeals for the Ninth Circuit.

In support of their contention that the materials in question here are subject to the use tax, the defendants rely strongly on the case of Nashville Ry. Co. v. Wallace, 288 U. S. 249, 261, 266. In that case the railroad brought suit in a Tennessee court for a declaratory judgment holding unlawful an excise tax of that state levied upon the storage and withdrawal from storage of gasoline.

The railway purchased the gasoline from points outside the state, brought it into Tennessee and stored it in private tanks. Subsequently all of it was withdrawn from storage to be used as a source of motive power in interstate railway

operations. The company assailed the tax both on the ground that the gasoline while stored was still a subject of interstate commerce and on the ground that because of its subsequent use as fuel, the tax was in effect a tax upon the use of the fuel in interstate commerce. The Supreme Court affirmed the highest court of Tennessee in decreeing that the tax was valid. In answer to the railway's first contention it said (p. 266):

"The gasoline, upon being unloaded and stored, ceased to be a subject of transportation in interstate commerce and lost its immunity as such from state taxation. * * * The fact that the oil was, in the ordinary course of appellant's business, later withdrawn from storage for use, some within and some without the state, part of it thus becoming again the subject of interstate transportation, did not affect the power of the state to tax it all before that transportation commenced."

In answer to the argument that the tax was one in effect upon the use of gasoline in interstate transportation, it [fol. 70] was held (p. 267):

"We cannot say that the tax is a forbidden burden on interstate commerce because appellant uses the gasoline, *subsequent* to the incidence of the tax as an instrument of interstate commerce. Taxes said to burden interstate commerce directly when levied upon or measured by the operation of interstate commerce or gross receipts derived from it, are beyond the state taxing power * * *.

"But interstate rail carriers are not wholly immune from other forms of non-discriminatory state taxation, even though the burden of the tax is thus indirectly or incidentally imposed upon the interstate commerce in which they are engaged. It cannot be doubted that, when the gasoline came to rest in storage, the state was as free to tax it, notwithstanding its *prospective* use as an instrument of interstate commerce, as it was to tax appellant's right of way, rolling stock, or other instruments of interstate commerce, which are subject to local property taxes." (Emphasis supplied.)

Here the Supreme Court makes a finding of ultimate fact that the storage was not a use in interstate commerce. The admitted probative facts in that case upon which the

finding of ultimate fact was made are not the same as in the instant case. In the case at bar the admitted fact is that the storage is an immediate and not a "prospective use" in interstate commerce.

It is plain from the above quotation that the Supreme Court did not have before it for decision in the Nashville case the question whether or not the gasoline stored was already set apart, devoted, and predetermined for use in interstate commerce before it entered the state. We have studied exhaustively not only the opinion of the Supreme Court but also the record and briefs in that case. Nowhere do we find that the gasoline upon entering the State of Tennessee or upon its deposit in the storage tanks was allocated, set apart, and dedicated to interstate commerce uses. Nowhere do we find contention or proof that the stored gasoline was a part of the railroad's current operating in- [fol. 71] ventory, recognized as such by the Federal Government. It was nowhere argued that the gasoline while in the tanks was being used in interstate commerce. As we have already indicated, property is not exempt from state use taxation merely by virtue of the fact that in the ordinary turn of events it will be used in interstate commerce, or the fact that subsequently all of it has been so used. In each case there must be facts, admitted or proved, which show that the keeping or retention is in itself a use in interstate commerce.

What we have said of the Nashville case is equally true of Edelman v. Boeing Air Transport, 289 U. S. 249, 251, 253. In that case the taxpayer purchased gasoline within and without Wyoming and stored the same in tanks at its Wyoming airports. It was subsequently withdrawn, some for local sale, some for local use, and some for fueling the taxpayer's interstate airplanes. Wyoming levied an excise tax on the use of gasoline, the incidence of the tax falling on the withdrawal from storage. The taxpayer objected to paying the excise on the fuel withdrawn for interstate planes. The Supreme Court held against the taxpayer, saying that the ruling facts of the case were identical with those in the Nashville decision.

Our examination of the Edelman decision reveals that, as in the Nashville case, there was neither contention nor proof made that the gasoline taxed was set apart or allocated by the taxpayer to an interstate use before it was actually being consumed in the planes; nor any evidence

that it was in any way brought under the jurisdiction of the Interstate Commerce Commission. The case is even weaker than the Nashville decision, in view of the fact that when the gasoline was put in storage only an indefinable [fol. 72] part of it was subsequently to be used in interstate commerce.

We hold, therefore, that the Nashville and Edelman cases are not controlling on the facts alleged in this complaint. The facts alleged and admitted here bring this case within the principle of the Helson, Bingaman and Cooney cases. In this view it is unnecessary to consider whether the authority of the Nashville and Edelman cases is weakened by Graves v. Texas Co., 298 U. S. 393, 401, wherein it was held, without mentioning the Nashville and Edelman decisions, that a state tax levied on the withdrawal of gasoline from storage for delivery to the United States was void as being an exaction against the activities of the Federal Government.

Reaching a conclusion similar to that of the District Court for Washington, in construing like provisions of a use tax of that state,[11] we hold that the defendants may not constitutionally enforce the provisions of the California Use Tax Act against the plaintiff upon the property set out in the complaint.

The defendants are at liberty, of course, to put the plaintiff to proof of its allegations of present use of the materials as alleged in the bill. And nothing in this opinion bears upon the right of a state to levy a tax upon the intrastate use or property such as that in issue here, under any formula calculated reasonably to apportion the inter- [fol. 73] state and intrastate commerce uses.

The motion to dismiss the complaint is denied. Plaintiff will be awarded an interlocutory injunction. Plaintiff will prepare and file proposed findings of fact, conclusions of law, and decree.

William Denman, U. S. Circuit Judge. Michael J. Roche, U. S. District Judge. A. F. St. Sure, U. S. District Judge.

[File endorsement omitted.]

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[11] Northern Pacific Ry. v. Henneford, 15 Fed. Supp. 302.

[fol. 74] IN UNITED STATES DISTRICT COURT

[Title omitted]

DECREE FOR INTERLOCUTORY INJUNCTION—Filed November 16, 1937

This cause came on regularly for hearing pursuant to order to show cause issued on the 10th day of July, 1936, on plaintiff's verified complaint and motion for interlocu-[fol. 75] tory injunction, and the court having considered the record, pleadings, and files herein, and the argument of counsel, and the opinion of the court having been filed on September 10, 1937, and the court's findings of fact and conclusions of law having been filed on the 16th day of November, 1937, and the court having found and concluded therein that plaintiff is entitled to an interlocutory injunction as prayed for,

Now, therefore, it is hereby Ordered, Adjudged and Decreed as follows:

1. Pending the final determination of this action and until the further order of this court, the defendants John C. Corbett, Fred E. Stewart, Richard E. Collins, Ray L. Edgar and Harry B. Riley, as members of the State Board of Equalization of the State of California, State Board of Equalization of the State of California, and U. S. Webb, the Attorney General of the State of California, and each of them, their successors, and any and every person acting or attempting to act under and by virtue of the authority of the California Use Tax Act of 1935, Chapter 361 of the Statutes of the State of California for 1935, and acts amendatory thereto, and all persons to whom notice of this injunction shall come, be and they are hereby enjoined and restrained from threatening, attempting, or proceeding to enforce or to take any steps to enforce said California Use Tax Act of 1935, Chapter 361, Statutes of 1935 of the State of California, as against the plaintiff herein, or any of its agents, servants and employees, on account of any claim that said California Use Tax Act applies to the taxation of tangible personal property purchased or to be purchased by plaintiff at points outside of the State of California, and brought into said state for use, and at all times used, in said State of California by plaintiff in its inextricably intermingled interstate and intrastate telephone and tele-

[fol. 76] graph commerce and business, and they and each of them are further enjoined from imposing or collecting on account thereof any taxes, penalties, or interest thereon, or from commencing any prosecution of suits or issuing any summary process against the plaintiff on account thereof, or from proceeding or attempting to set up, assess, or claim any such taxes, penalty, or interest against the plaintiff on account of any such purchases.

2. This decree and injunction shall become effective and operative upon the filing by the plaintiff of a bond in a form required by law, in the sum of $160,000, to be approved by this court, and upon the filing of such bond, the bonds heretofore filed by plaintiff as required by the temporary order heretofore entered will be exonerated and discharged.

3. When any further payments under the California Use Tax Act of 1935 shall become by the terms thereof due and payable by said plaintiff, then upon the filing of a good and sufficient bond approved by the court or any judge thereof in an amount agreed upon between the parties to the cause, said interlocutory injunction shall be extended to the enforcement of said act as to any such payment, and if the parties fail to agree on the amount of such additional bond, any of the parties may move the court to take any action which he or they may desire.

And whereas an action is pending in this court entitled "Western Electric Company, Incorporated, v. John C. Corbett, et al.," Equity No. 4066L, involving the applicability of the California Use Tax Act of 1935 to the use, storage, or other consumption of tangible personal property purchased by the plaintiff herein from said Western Electric Company, Incorporated, and the tax involved in that action is a duplication of the tax involved in this action, and the defendants can enforce the collection of such tax, if liability [fol. 77] therefor is found to exist, either from said Western Electric Company, Incorporated, or from the plaintiff herein, but not from both,

Now, Therefore, it is further Ordered that a bond given by and on behalf of said Western Electric Company, Incorporated, and the plaintiff herein, covering the liability of either said Western Electric Company, Incorporated, or the plaintiff herein, whichever shall be found liable on account

of said tax, shall be accepted as a proper bond in the premises.

Dated November 16, 1937.

William Denman, United States Circuit Judge.
Michael J. Roche, United States District Judge.
A. F. St. Sure, United States District Judge.

Approved as to form, as provided in Rule 22, and as to amount of bond, superseding stipulation dated October 4, 1937.

U. S. Webb, Attorney General; H. H. Linney, Deputy Attorney General, Attorneys for Defendants.

[File endorsement omitted.]

[fol. 78] In United States District Court

[Title omitted]

Answer to Bill of Complaint—Filed September 30, 1937

Come Now the defendants above named and answering the bill of complaint on file herein admit, allege and deny as follows:

[fol. 79]

I

Defendants admit the allegations found in paragraph I of said complaint except that defendants deny that plaintiff could not discontinue its said intrastate commerce and business without being compelled to withdraw from its interstate commerce and business.

II

Defendants admit the allegations found in paragraph II of said complaint on file herein, except that said defendants deny that the tax imposed under the Use Tax Act of 1935, Chapter 361, Statutes of 1935 of the State of California constitutes a tax upon the use of said materials in carrying on interstate telephone and telegraph commerce and business, or that said tax constitutes a tax and burden upon the privilege of using said materials in conducting interstate telephone and telegraph commerce and business or that said tax is a burden on interstate and foreign com-

merce, contrary to and in violation of the provisions of Article I, Section 8, Clause 3, and Article I, Section 10, Clause 2 of the Constitution of the United States, or that the imposition or collection of said tax effectuates a taking of plaintiff's property without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States, as alleged in paragraph II of said complaint.

III

Defendants admit the allegations found in paragraph III of the complaint on file herein except that defendants deny that said property was held and used by plaintiff as a part of its interstate and intrastate telephone and telegraph system or that the central office switchboards, telephone tables, etc. were shipped to various points in the State of California for the immediate installation and use by plaintiff forthwith upon its said shipment as part of the said interstate a- intrastate telephone and telegraph system of [fol. 80] plaintiff or that said property was forthwith, upon its arrival, installed and used by plaintiff as part of its interstate and intrastate telephone and telegraph system or that no part of said property was stored in the State of California for any period of time whatsoever or that said materials so distributed and held for such uses referred to in pa.agraph III of said complaint and the process for distribution and the holding thereof for such uses are inseparably and essentially a part of the conduct and operation of such telephone and telegraph commerce and business, or that all of said articles so purchased by plaintiff from said Western Electric Company, Incorporated, were and are especially designed for use in the operation and maintenance of said telephone and telegraph system, or that said articles are peculiarly adapted to telephone and telegraph uses or that said articles are not suitable for any other use, all as alleged in paragraph III of said complaint.

Further, defendants deny that all of said items of tangible personal property so purchased by plaintiff from said Western Electric Company, Incorporated, were devoted to the telephone and telegraph service immediately upon their purchase, or that upon the purchase of said articles they immediately became a necessary and indispensable part of working capital, materials, supplies, equipment and instrumentalities for the operation and conduct of such telephone

and telegraph business or that the said articles and each and all of them became, were and are instrumentalities used indiscriminately and in common, in and for the operation and maintenance of said telephone and telegraph system for conducting said inextricably intermingled interstate and intrastate telephone and telegraph commerce and business from the time the same were purchased therefor, all as alleged in paragraph III of said complaint.

[fol. 81] Further defendants deny that said articles of tangible personal property underwent no storage of any character intervening between the ending of the interstate transportation thereof which followed the purchase of said items of property and the time when the same, and each thereof, were allocated and dedicated to uses in the conduct of said interstate and intrastate telephone and telegraph business by plaintiff, or that at all times from the purchase of said materials until the use thereof by plaintiff, said materials were, and each item thereof was, devoted, dedicated and set apart exclusively for use in such inextricably intermingled interstate and intrastate telephone and telegraph commerce and business, or that any keeping or retention of said materials or any item thereof within the State of California was and is an inseparable part of the use thereof in such inextricably intermingled interstate and intrastate commerce, all as alleged in paragraph III of said complaint.

IV

Defendants admit the allegations found in paragraph IV of said complaint on file herein.

V

Defendants admit the allegations found in paragraph V of said complaint.

VI

Defendants admit the allegations found in paragraph VI of said complaint.

VII

Defendants admit the allegations found in paragraph VII of said complaint.

[fol. 82]

VIII

Defendants deny that the imposition of said taxes upon plaintiff as alleged in said complaint under the said act, as

the same is, and has been construed and applied by said defendants, and each of them, is in violation of Article I, Section 8, Clause 3, of the Constitution of the United States and Article I, Section 3, of the Constitution of the State of California or that said tax constitutes a direct burden on interstate and foreign commerce, contrary to and in violation of the provisions of Article I, Section 8, Clause 3, and Article 1, Section 10, Clause 2, of the Constitution of the United States, or that the tax is a taking of plaintiff's property without due process of law, and in violation of the Fourteenth Amendment of the Constitution of the United States, and Article I, Sections 3 and 13, of the Constitution of the State of California, as alleged in paragraph VIII of the said complaint on file herein.

IX

Defendants admit the allegations found in subdivision (a) of paragraph IX of the complaint on file herein, but deny all the remaining allegations of paragraph IX of said complaint on file herein.

As a separate, further and distinct answer, defendants allege as follows:

I

That subsequent to the date that the tangible personal property referred to in the bill of complaint on file herein was purchased, and at all times prior to the date when said [fol. 83] property was installed, after interstate transportation of the property had ended, the property was not used in plaintiff's interstate telephone and telegraph commerce and business, or in plaintiff's inextricably intermingled intrastate and interstate telephone and telegraph commerce and business.

II

That subsequent to the time that plaintiff purchased, outside of the State of California, the said property, and after the interstate transportation of said property into the State of California had ended, the said property was stored in the State of California and placed in plaintiff's private warehouse, or on plaintiff's private property for some period of time prior to the date that plaintiff actually installed said property in its telephone and telegraph commerce and business or actually used the same in its in-

extricably intermingled interstate and intrastate telephone and telegraph commerce and business.

III

That plaintiff, after the interstate transportation of said tangible personal property had ceased, and after the property was stored at points in the State of California, and subsequent to the date of installation of the same into plaintiff's interstate telephone and telegraph commerce and business, used or will use all of said property in conducting its inextricably intermingled interstate and intrastate telephone and telegraph commerce and business.

IV

That the State Board of Equalization has demanded payment of the use tax from plaintiff for the privilege of storing said property in the State of California after interstate [fol. 84] transportation of the same has ended and prior to installation of the same, and further for the privilege of using the property in its intrastate telephone and telegraph commerce and business only; that the amount of the tax was not increased because plaintiff used the property in its interstate telephone and telegraph commerce and business.

V

That the plaintiff at the time of the shipment of said tangible personal property from points of origin did not arrange a destination for the property other than plaintiff's points of storage in the State of California.

VI

That plaintiff was free to use the property in its telephone and telegraph commerce and business or for any other purpose after transportation had ceased and the property was stored in the State of California.

Wherefore, defendants pray that plaintiff take nothing by its action herein, that the Bill of Complaint be dismissed, for costs of suit, and for such further relief as the court may deem meet and proper in the premises.

U. S. Webb, Attorney General; H. H. Linney, Deputy Attorney General; James J. Arditto, Deputy Attorney General, Attorneys for Defendants.

Receipt of copy of the within Answer admitted this 30 day of September, 1937.

Pillsbury, Madison & Sutro, Attorneys for Plaintiff.

[File endorsement omitted.]

[fol. 85] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION OF FACTS—Filed December 21, 1937

In addition to the facts alleged in the bill of complaint which are admitted by defendants' answer, it is stipulated [fol. 86] that the following are admitted facts. Hereinafter the use of the present tense indicates a continuous course of action during all of the times material to the issues in this case.

Plaintiff's Telephone and Telegraph Business and Operations

1. The plaintiff's interstate and intrastate telephone and telegraph commerce and business are inextricably intermingled. Plaintiff's interstate and intrastate telephone and telegraph system includes plant and equipment sufficient to enable it to render efficient and economical telephone service according to the demand of the public for such telephone service, including both interstate and intrastate service. It is not feasible, economically or practically, for a corporation engaged, as the plaintiff is, in an inextricably intermingled interstate and intrastate telephone and telegraph commerce and business, to provide separate state-wide telephone and telegraph systems, one for the interstate business and the other for the intrastate business of such corporation.

2. Plaintiff's interstate and intrastate telephone and telegraph system, and all of plaintiff's capital (with relatively small exceptions not material to this action), including plant and operating capital, are exclusively devoted inextricably and indiscriminately to interstate and intrastate telephone and telegraph service, commerce and business, the same plant, facilities and organization being devoted indiscriminately to and used indiscriminately in such

interstate and intrastate service. Reference hereinafter in this stipulation to plaintiff's "telephone and telegraph system" and to plaintiff's "telephone and telegraph business" means and is reference to plaintiff's telephone and telegraph system devoted inextricably and indiscriminately to interstate and intrastate telephone and telegraph service, [fol. 87] and to plaintiff's inextricably intermingled interstate and intrastate telephone and telegraph commerce and business.

Purchases of Property on Account of Which Tax is Claimed to be Due

3. In the necessary operation, maintenance and repair of its telephone and telegraph system, plaintiff purchases from Western Electric Company, Incorporated, hereinafter called "Western Electric," large amounts of tangible personal property consisting of equipment, apparatus, materials and supplies for use as integral parts of and exclusively in and in common for its interstate and intrastate telephone and telegraph commerce and business. Plaintiff purchases all of said tangible personal property in accordance with the purposes, plan and methods hereinafter described in paragraphs 12, 13, 14, 15, 20, 21 and 22 hereof, and for the sole and exclusive purpose of making it a part of plaintiff's said telephone and telegraph system and of using it indiscriminately and in common in and for the conduct of plaintiff's inextricably intermingled interstate and intrastate telephone and telegraph commerce and business, and of doing and performing all of the acts and things with respect to such property, including holding and retention thereof in the State of California, which are hereinafter described. Said purchases are made at points outside the State of California, and said equipment, apparatus, materials and supplies are shipped in interstate commerce by Western Electric to plaintiff at various points in the state.

General Classes of Property Involved

4. The tangible personal property involved in this action is of two general classes: goods purchased on specific orders for installation at a particular place and to serve a particular purpose in the plaintiff's telephone and telegraph [fol. 88] system, hereinafter called "specific order equipment"; and goods purchased from time to time for holding

as stand-by facilities to meet fluctuating demands and emergencies resulting from changes in the public demand for service and to make repairs necessitated by the casual destruction of plaintiff's property, etc., hereinafter called "stand-by facilities."

Amounts of Purchases and of Tax Claimed to be Due on Account Thereof

5. During the quarterly periods of three months which ended respectively June 30, 1936, September 30, 1936, December 31, 1936, March 31, 1937, June 30, 1937, and September 30, 1937, plaintiff purchased from Western Electric at points outside the State of California tangible personal property of the character hereinabove described for the total sales or purchase price of $5,034,669.86. The respective amounts of the purchase price of the specific order equipment, the stand-by facilities, and the total tangible personal property so purchased by plaintiff from Western Electric during said six quarterly periods, and the respective amounts of the total tax claimed by defendants to be due on account thereof under the terms of the Use Tax Act of 1935 of the State of California, are as follows:

Quarter ending	Price of specific order equipment	Price of stand-by facilities	Total price of tangible personal property	Tax claimed to be due
June 30, 1936.....	$435,062.00	$116,387.00	$551,469.00	$16,544.07
Sept. 30, 1936.....	1,631,653.00	11,488.00	1,643,141.00	49,294.23
Dec. 31, 1936.....	569,801.00	56,433.00	626,234.00	18,787.02
Mar. 31, 1937.....	471,135.21	103,000.33	574,135.54	17,224.07
June 30, 1937.....	825,327.56	40,235.76	865,563.32	25,996.90
Sept. 30, 1937.....	745,530.00	28,597.00	774,127.00	23,223.81

[fol. 89] Purchase of Equipment Through Use of Operating Capital, and Devotion to Telephone and Telegraph Service

6. All of the articles of tangible personal property hereinabove described are purchased by plaintiff through use of operating capital, consisting of money or current assets definitely devoted to the telephone and telegraph service, or through the credit of plaintiff as a telephone and telegraph company engaged in such telephone and telegraph service.

7. All of said articles of tangible personal property hereinabove described are necessary to the efficient and economic operation of plaintiff's telephone and telegraph sys-

tem, and the purchases thereof are made in the manner hereinafter described and at the times and in the amounts necessary to meet the needs of plaintiff's telephone and telegraph business. Plaintiff considers said articles from the time of their purchase as a part of plaintiff's said telephone and telegraph system and as instrumentalities devoted to the operation and conduct of plaintiff's telephone and telegraph business.

8. Plaintiff engages in no business other than its said inextricably intermingled interstate and intrastate telephone and telegraph commerce and business. The said articles, by reason of their nature, and by reason of the purpose for which and the particular specifications by which they are manufactured, as hereinafter described, are not, after their purchase by plaintiff from Western Electric, as hereinabove described, readily or practically salable by plaintiff to other persons, and plaintiff does not divert and has no practical way of diverting any of said articles to any use other than their intended use in plaintiff's said inextricably intermingled interstate and intrastate telephone and telegraph commerce and business.

[fol. 90] Accounting

9. Plaintiff keeps the accounts of its said telephone and telegraph business according to the accounting rules and regulations and the uniform system of accounts for telephone companies promulgated and prescribed by the Federal Communications Commission. The uniform system of accounts contains telephone plant accounts, described as follows:

"Telephone Plant Accounts

20. Purpose of telephone plant accounts.—(A) The telephone plant accounts (201 to 277, inclusive) are designed to show the original cost (note instruction 3-S. 1) of the company's telephone plant (note instruction 3-BB) which ordinarily has a service life of more than 1 year, including such plant whether used by the company or others in telephone service (note instruction 3-AA); also the original cost of franchises, patents, rights of way, leaseholds and other interests in land. It shall also include the general expenses of organization of the accounting company."

and operating expense accounts, described as follows:

"Operating Expense Accounts

60. Purpose of operating expense accounts.—The operating expense accounts (602.1 to 677 inclusive) are designed to show the expenses of furnishing telephone service (note instruction 3-AA), including expense of maintaining the plant used in such service. (Note also instructions 4, 5, and 6.)"

Telephone plant accounts include, among others, accounts of central office equipment, station apparatus, station installation, pole lines, aerial cable, buried cable, aerial wire, underground conduit, and furniture and other office equipment. Typical of the specifications for these accounts are the specifications for the central office equipment account, which are as follows:

"221. Central office equipment.—(A) This account shall include the original cost (note instruction 3-S.1) of electrical instruments, apparatus, and equipment, other than station equipment, in central offices (including terminal and test rooms), repeater stations and test stations used in transmitting traffic and operating signals, and similar equipment in operators' schools and other centralized locations.

[fol. 91] (B) This account shall also include the original cost of operators' chairs, wire chiefs' tools, desks and tables equipped with central office telephone equipment, and other furniture, fixtures, and equipment designed specifically for use in central offices, repeater stations, etc., or installed as a part of the electrical equipment therein. (See also note A to this account.)

Items

[Note instruction 8]

Aisle—lighting equipment.
Balconies for distributing frames.
Banks—connector, selector.
Batteries.

[Here follows continuation of alphabetical list of items of equipment.]"

The operating expense accounts include, among others, a number of repair accounts. Typical of the specifications for these repair accounts are the specifications for the account of repairs of pole lines, which are as follows:

"602.1. Repairs of pole lines.—This account shall include the cost of repairing pole lines and the cost of maintaining right of way therefor.

[Here follows list of items.]"

The uniform system of accounts also prescribes an account of material and supplies, described as follows:

"122. Material and supplies.—(A) This account shall include the cost of unapplied material and supplies held in stock, including plant supplies, tools, fuel, stationery, directory paper stock, and other supplies; and material and articles of the company in process of manufacture for supply stock."

10. Immediately upon the purchase of the articles of tangible personal property hereinabove mentioned they became and are subject to accounting in the manner and form hereinabove described.

Specific Order Equipment

11. Specific order equipment consists of central office switchboards, frames, cable racks, large private branch exchange switchboards, large underground cables, switches, [fol. 92] central office cable, wire, protectors and other component parts of telephone and telegraph lines.

Specification of Equipment to Meet Particular Need

12. The plaintiff orders all of the specific order equipment for immediate installation in the manner hereinafter described in paragraphs 16 and 17 hereof at particular points in plaintiff's telephone and telegraph system and to serve particular purposes and needs in the system. Plaintiff purchases equipment of this class for four general purposes: (1) to meet the public demand for telephone and telegraph service in territories in which plaintiff is operating and offering such service, in accordance with plaintiff's obligations as a corporation engaged in and rendering telephone and telegraph service, (2) to improve existing

service, as part of a service improvement program, (3) to render existing service at less cost, as part of a general economy program, and (4) to make plant changes necessary to maintain the efficiency of plaintiff's system, and to conform to changes in public ways, rights of way, and public requirements. The plaintiff periodically makes an estimate of its equipment needs for the purposes above mentioned. This estimate is based upon (1) a survey by plaintiff's commercial department of the expected growth of telephone business in each locality and in connection with each exchange, (2) an estimate by plaintiff's traffic engineers of the equipment necessary to take care of the growth of business and to fulfill plaintiff's service improvement and economy programs, and (3) an estimate by plaintiff's equipment engineers of the actual equipment specifications to fill the equipment needs found by the traffic engineers. As a matter of practical economy, such an estimate provides for the least practical quantities of equipment required for the [fol. 93] particular purpose to be served.

13. To meet a need thus disclosed at a particular point and for a particular purpose in plaintiff's telephone and telegraph system, plaintiff's engineers draw up a "project" containing the equipment specifications and cost necessary to fulfill this need in the most efficient and most economical manner, and in the manner best calculated to serve the public. Plaintiff's equipment engineers reduce the project to its detailed specifications—the number of frames, the number and type of switches, size and arrangement of trunk groups, etc.—with supplemental explanatory drawings. The project, if it involves a large expenditure, is then submitted to plaintiff's executive officers and board of directors for approval and authority to make the expenditure; if the expenditure is small, the project is submitted to some other designated official of plaintiff.

14. When a project is thus approved and the necessary expenditure authorized, plaintiff's engineers prepare an order or "requisition," and forward it to Western Electric. In the case of central office equipment and private branch exchange switchboards, the requisition is accompanied by the detailed specifications and drawings.

Special Manufacture

15. Western Electric manufactures specially—i. e., makes to order and according to plaintiff's particular specifications as to each article of equipment—central office switchboards, large private branch exchange switchboards, large underground cables, switches, frames, cable racks, etc., thus ordered by plaintiff. It may manufacture specially, or may take out of existing stock, items such as central office cable, wire, and protectors. By far the larger part of the specific [fol. 94] order equipment is not manufactured by Western Electric until it receives orders therefor, and is then manufactured according to plaintiff's particular specifications as to each article of equipment; and its stock of other equipment is manufactured after receipt from plaintiff of a "preview" of anticipated orders, which, when they are given, can be filled out of such stock. All of the specific order equipment is especially designed for use in the operation of a telephone and telegraph system, and is peculiarly adapted to telephone and telegraph uses and is not suitable for any other use.

16. A single exception to some of the statements of fact hereinabove contained exists in the following particular: the category of specific order equipment includes a small number of exchange telephone poles (which are of a different specification, size and weight, being larger and heavier, than are toll poles and other exchange poles which are purchased by plaintiff for, and are peculiarly adapted to, plaintiff's own exclusive use as aforesaid) with the plan and for the purpose of using them, under joint pole agreements, jointly with power companies, light companies, etc., for carrying plaintiff's telephone and telegraph wires and also the wires of such other companies. The purchase and use of joint poles in this manner is an ordinary and customary practice in the conduct of a telephone and telegraph business such as that of the plaintiff. Plaintiff receives payment from such other company or companies for the right and interest of such other company or companies in and to their joint use of such joint poles. Plaintiff's use of such joint poles is exclusively for and in the conduct of its interstate and intrastate telephone and telegraph commerce and business as aforesaid, and is by means of crossarms and other

equipment peculiarly adapted to telephone and telegraph uses as aforesaid and not suitable for any other use.

[fol. 95] Installation of Specific Order Equipment

17. Specific order equipment, after the termination of the interstate shipment thereof, is installed either by plaintiff's employees or by experts in the employ of an agency hired by plaintiff to make specific installations. In either case, plaintiff orders and Western Electric arranges delivery at times which not only are appropriate to the desired time for completion of each installation project but also coincide with times when the installers will be available to make the installation. Western Electric ships the goods, when ready, by public carrier, consigned to plaintiff at the place of use. When plaintiff is informed that the goods have arrived, plaintiff sends its trucks to be at the dock or railroad car at the time when, as plaintiff is informed, the goods will be ready for delivery and available for unloading. Plaintiff's representative receipts for the goods at the dock or breaks the seal of the railroad car, as the case may be, and plaintiff's employees unload the goods directly from the dock or car into the trucks. Generally the trucks are driven directly to the building in which the equipment is to be installed; but in handling some kinds of equipment in large metropolitan centers, for reasons of economy in trucking, the equipment is sometimes carried first to a distributing center and there reloaded into other trucks which carry it to the building in which it is to be installed. The equipment is then moved directly from the truck into the building to the place of installation. On the arrival of the equipment at the place of installation, the installers commence installation immediately and the installation is a continuous process, except as this statement is qualified by the matters stated in the next paragraph.

18. There is no holding, in any warehouse, storeroom or [fol. 96] other like place of deposit, of any of the specific order equipment after the termination of the interstate shipment and the plaintiff's receipt thereof; however, time intervals during which such equipment is retained or held in the possession of the plaintiff and is not in motion in the course of installation thereof, occur between the time of termination of the interstate shipment thereof and the time when the installation of such equipment is completed and said equipment is available, as physically connected parts of

plaintiff's telephone and telegraph plant, for carrying interstate and intrastate communications for the public; said time intervals being such as occur when individual pieces of equipment are momentarily at rest on plaintiff's truck after being loaded thereon from the dock or car and before the truck starts to its point of destination, and such as occur when individual pieces of equipment are set down at the place where they are to be physically connected with plaintiff's plant and before further movement or handling thereof in the course of installation can proceed. In practically all installation projects the process of connecting parts of the equipment with and into plaintiff's physical plant is under way before the gathering of all equipment involved in the project at the place of connecting the same with said plant is complete. There is no retention or holding of any of said equipment except such as necessarily occurs in the ordinary and efficient course of transporting said equipment to its ultimate destination and installing it as physically connected parts of plaintiff's telephone and telegraph plant.

With reference to private branch exchange switchboards only, in exceptional instances it occurs that a subscriber orders such a switchboard for installation at a particular time, and that, because of construction delays and for like [fol. 97] reasons, the place where such switchboard is to be installed is not ready when plaintiff receives such switchboard at the end of the interstate shipment thereof. Plaintiff then holds such switchboard at some convenient place until the place of installation is ready, and then installs the same as hereinabove described. The period of such holding, in the experience of plaintiff, rarely exceeds a few days.

Accounting of Specific Order Equipment

19. When plaintiff receives specific order equipment from Western Electric, as hereinabove described, plaintiff's accounting department, pursuant to the said accounting rules and regulations and uniform system of accounts for telephone companies, charges to its repair accounts (being accounts of plaintiff's expenses of operating its said interstate and intrastate telephone and telegraph system, as hereinabove described) the cost of such part of the equipment as is installed in plaintiff's plant for the purpose of making repairs, and to its appropriate plant accounts (being accounts of plaintiff's capital devoted to the telephone

and telegraph service, as hereinabove described) the cost of such part of the equipment as constitutes new additions in plaintiff's telephone and telegraph system.

Stand-by Facilities

20. In the interest of prompt and efficient public service and in the performance and discharge of its obligations to the public as a corporation engaged in and rendering telephone and telegraph service, plaintiff is required and compelled to have supplies to meet current requirements distributed over its entire telephone and telegraph system in quantities and at the times necessary to anticipate regular current requirements, and to have such reserves in quantities necessary to meet constantly fluctuating demands and [fol. 98] emergencies which result from changes in the public demand for service and the repairs which from time to time are unavoidably made necessary by the destruction of property by reason of fires, storms and other weather conditions and unavoidable casualties and ordinary wear and tear which occur in connection with conducting its telephone and telegraph commerce and business.

21. Stand-by facilities purchased by plaintiff from Western Electric at points outside the state consist of small private branch exchange switchboards, teletypewriter equipment, cable, loading coils, poles, crossarms, wood conduits and a small amount of copper wire. Private branch exchange switchboards and teletypewriter printers comprise by far the largest part of the stand-by facilities. All of such stand-by facilities are especially designed for use in the operation of a telephone and telegraph system, and are peculiarly adapted to telephone and telegraph uses and are not suitable for any other use.

Ordering of Stand-by Facilities

22. To replenish supplies of stand-by facilities, plaintiff's supply department places orders with Western Electric approximately once a month. As a matter of practical business economy, plaintiff thus orders periodically only such quantities of stand-by facilities as it determines to be necessary in the conduct and operation of its said telephone and telegraph business and system to meet current requirements, emergency demands, repairs, and wear and tear, as above stated.

Receipt, Distribution and Maintenance of Stand-by Facilities

23. Western Electric ships such stand-by facilities by carrier, consigned to plaintiff at central points of its telephone and telegraph system. When notified of the arrival [fol. 99] of the goods, plaintiff sends trucks to pick them up at the dock or railroad depot. Plaintiff's employees unload the goods directly into the trucks and carry them, in accordance with the needs and purposes for which they were ordered, to the places where plaintiff keeps stores of such stand-by facilities, or in some instances, for reasons of economy in trucking, to a distributing center, there to be reloaded into other trucks which carry them to the places where plaintiff keeps stores of stand-by facilities. After the termination of the interstate shipment of such stand-by facilities, and upon their arrival at the said places where plaintiff keeps its stores of stand-by facilities, plaintiff retains and holds them in said stores as stated in the next paragraph.

24. Plaintiff retains and holds and keeps on hand, in storage space provided by it in the State of California at strategic points—i. e., at points suitable for prompt distribution of stand-by facilities as needed—over its entire telephone and telegraph system, private branch exchange switchboards and teletypewriter equipment, and small stores of poles, cable and loading coils. Plaintiff keeps its stores of such materials in quantities necessary to meet current requirements and the constantly fluctuating demands and emergencies which result from changes in the public demand for service and the repairs which from time to time are unavoidably made necessary by the destruction of property by reason of fires, storms and other weather conditions and unavoidable casualties and ordinary wear and tear which occur in connection with conducting plaintiff's telephone and telegraph business.

25. The distribution by plaintiff of stand-by facilities to stores located at strategic points over plaintiff's telephone and telegraph system, and the holding of such stand-by facilities in these stores, as hereinabove described, is neces- [fol. 100] sary to insure the rendition by plaintiff, as efficiently and as free from interruption as possible, of interstate and intrastate telephone and telegraph service.

Installation of Stand-by Facilities

26. When repairs become necessary to any part of plaintiff's telephone and telegraph system, plaintiff's employees who are charged with making such repairs take out of plaintiff's stores such of said stand-by facilities as are necessary to make the repairs. When any person makes a demand for a private branch exchange switchboard or for teletypewriter equipment, supplies of this nature are taken out of plaintiff's stores on disbursement tickets to meet service orders. Plaintiff's installer-repairmen take these supplies out of the stores, take them to the place where they are needed and make the necessary installation.

27. Between the time when said stand-by facilities are taken from plaintiff's stores as above described and the time when the installation of such facilities is completed and said facilities are available, as physically connected parts of plaintiff's telephone and telegraph plant, for carrying interstate and intrastate communications for the public, time intervals occur during which such facilities are retained or held in the possession of the plaintiff and are not in motion in the course of installation thereof; said time intervals being such as occur when individual pieces of equipment are momentarily at rest on plaintiff's truck after being loaded thereon from plaintiff's stores and before the truck starts to its point of destination, and such as occur when individual pieces of equipment are set down at the place where they are to be physically connected with plaintiff's plant and before further movement or handling thereof in the course of installation can proceed. After such stand-by facilities are taken from plaintiff's stores [fol. 101] as above described, there is no retention or holding of any of said facilities except such as necessarily occurs in the ordinary and efficient course of transporting said facilities to their ultimate destination and installing them as physically connected parts of plaintiff's telephone and telegraph plant.

Accounting of Stand-by Facilities

28. When plaintiff receives such stand-by facilities from Western Electric, as hereinabove described, plaintiff's accounting department, pursuant to the said accounting rules and regulations and uniform system of accounts for telephone companies, charges the cost thereof to its "Ma-

terials and Supplies" account. Upon taking such supplies from its stores, plaintiff credits them to its said "Materials and Supplies" account, and charges them to its repair accounts if they are installed in plaintiff's plant for the purpose of making repairs, or to the appropriate plant accounts if they constitute new additions in plaintiff's plant.

Installation and Use (Facts Common to Specific Order Equipment and Stand-by Facilities)

29. The installation of all of said equipment, facilities, apparatus and materials is for the sole purpose of making said articles available as physically connected parts of plaintiff's telephone and telegraph plant for carrying interstate and intrastate communications for the public, and is necessary to that end.

30. In accordance with said accounting rules and regulations and uniform system of accounts, plaintiff charges the cost of carrying said articles by truck from the dock or railroad to the place of installation (including the cost of use of the trucks and the wages of the truckmen) and the cost of installation (including the wages of plaintiff's employees engaged in installation and the amounts paid to installers [fol. 102] hired from time to time) to its appropriate repair accounts or plant accounts as a part of the cost of said repairs or additions to plant.

31. When said articles of tangible personal property are physically connected with the plaintiff's telephone and telegraph plant they become and are a part of the facilities by which plaintiff's subscribers, and others who avail themselves of the telephone and telegraph service offered by the plaintiff, command at their pleasure the service they desire, whether interstate or intrastate; and all of said articles of tangible personal property, including specific order equipment and stand-by facilities, when the same are available, as physically connected parts of plaintiff's telephone and telegraph plant, for carrying interstate and intrastate communications for the public, are used by plaintiff exclusively in and for the operation and maintenance of plaintiff's telephone and telegraph system and indiscriminately and in common in and for conducting its inextricably intermingled interstate and intrastate telephone and telegraph commerce and business.

Necessity of Paying Tax Out of Operating Capital and Charging to Operating Expense Accounts and Plant Accounts

32. If the tax, the collection of which is sought by this action to be enjoined, should be paid, said tax would be paid out of plaintiff's capital devoted to the telephone and telegraph service as hereinabove stated, and would be a charge to plaintiff's operating expense accounts or plant accounts as part of the cost of the tangible personal property on account of which such tax should be paid, and which cost is charged to plaintiff's operating expense accounts and plant accounts as hereinabove described If said tax should be required to be paid, it would be a charge to and become a [fol. 103] cost of conducting plaintiff's inextricably intermingled interstate and intrastate telephone and telegraph commerce and business.

33. By reason of its inextricably intermingled interstate and intrastate commerce and business plaintiff is compelled to purchase from Western Electric, at points outside the State of California, a greater amount of tangible personal property than it would be required to purchase if it were engaged only in intrastate telephone and telegraph business. This is true because (1) a substantial quantity of plaintiff's equipment, such as pole lines between the state lines and cities near the border of California, and direct wires running from central offices and toll offices in large municipalities in California to large municipalities in other states, together with the portions of switchboard and other equipment connected therewith, are used for carrying interstate communications only and handle no intrastate business, (2) the amount of a large part of the central office equipment and other equipment which plaintiff necessarily maintains and operates in the conduct and operation of its telephone and telegraph business as aforesaid, is determined by the amount of traffic, including both interstate and intrastate telephone and telegraph communications, which it bears, and (3) plaintiff is informed and believes that some undetermined part of its equipment is necessarily maintained and operated in order to serve subscribers and patrons who would not demand or request telephone and/or telegraph service unless interstate as well as intrastate service were held out by plaintiff to such subscribers and patrons.

34. Notwithstanding that none of the property aforesaid was, is or will be used exclusively and separately by the

plaintiff in conducting intrastate telephone and telegraph [fol. 104] business, but that all of it is used as hereinbefore stated, defendants have demanded of the plaintiff the taxes aforesaid, under the provisions of Ruling No. 11 of the defendant, said State Board of Equalization, promulgated on or about February 6, 1936, which said ruling is as follows:

"The fact that tangible personal property is purchased in interstate or foreign commerce does not exempt from the tax the storage, use or other consumption of such property in this State after the shipment of the property in interstate or foreign commerce has ended.

The fact that tangible personal property is used in this State in interstate or foreign commerce following its storage in this State does not exempt the storage of the property from the tax. The tax does not apply to the use or storage of property purchased for use in interstate or foreign commerce and actually placed in use in interstate or foreign commerce prior to its entry into this State."

35. It is understood that in making this stipulation of evidential facts, defendants do not stipulate as an ultimate fact, that the articles involved herein were in interstate use in plaintiff's operation and conduct of its telephone and telegraph commerce and business prior to their physical installation in plaintiff's telephone and telegraph plant and system and/or their consumption in conducting telephone and telegraph commerce and business, it being expressly understood that the time when interstate use commenced is a matter of ultimate fact or mixed conclusion of law and fact to be determined by the court.

It is further understood by and between the parties hereto that this stipulation is a stipulation of facts only, and that neither party hereto is stipulating to conclusions of law, and that both parties hereto are entitled to draw such inferences from the facts herein stipulated, or such con- [fol. 105] clusions of law, as they may be so advised.

Dated December 21, 1937.

Pillsbury, Madison & Sutro, Attorneys for Plaintiff. U. S. Webb, Attorney General; H. H. Linney, by James J. Arditto, Deputy Attorney General, Attorneys for Defendants.

[File endorsement omitted.]

[fol. 106] In United States District Court, Northern District of California, Southern Division

Equity No. 4067-R

The Pacific Telephone and Telegraph Company (a Corporation), Plaintiff,

v.

John C. Corbett et al., Defendants

Before Denman, Circuit Judge, and St. Sure and Roche, District Judges

Opinion—Filed May 4, 1938

Denman, Circuit Judge:

The stipulation of facts filed herein supports the essential allegations of the bill of complaint.

The material, the storage use of which defendants seek to tax, consists (1) of specific order equipment including central office switchboards, frames, switches, cables, wires [fol. 107] and other essential components of telephone and telegraph transmission; and (2) reserve or "stand-by" facilities of the sort just described which must be kept on hand in sufficient quantities to meet emergencies and new demands.

The principles governing the taxation of the use of this material are identical with those applicable in Southern Pacific Co. v. Corbett, No. 4055-R (Filed May 3, 1938). For the reasons stated in our opinion in that case, we conclude that the bill herein must be dismissed.

We find the facts to be as stipulated and agreed by the parties. From those facts we conclude that the threatened enforcement of the California Use Tax Act will not impose a direct or undue burden on plaintiff's interstate commerce business.

The permanent injunction is denied and the bill dismissed.

William Denman, United States Circuit Judge.
Michael J. Roche, United States District Judge.
A. F. St. Sure, United States District Judge.

May 4, 1938.

[File endorsement omitted.]

[fol. 108] In United States District Court, Northern District of California

In Equity. No. 4055-R

Southern Pacific Company, a Corporation, Plaintiff,

v.

John D. Corbett, Fred E. Stewart, Richard E. Collins, Ray L. Edgar, and Harry B. Riley, as Members of the State Board of Equalization of the State of California; State Board of Equalization of the State of California, and U. S. Webb, the Attorney General of the State of California, Defendants

Before Denman, Circuit Judge, and St. Sure and Roche, District Judges

Opinion—Filed May 3, 1938.

Denman, Circuit Judge:

This case has been submitted under an agreed statement of facts which sustains the pertinent allegations of the bill discussed in our opinion denying the motion for its dismissal. 20 Fed. Supp. 940. The railway has established [fol. 109] that the storage use of the railway materials, solely for its current repairs and renewals and necessary extensions of its intermingled interstate and intrastate enterprise and plant, and without which usage the railways would stop running, is a use in interstate commerce. Hence a tax upon such use is a tax affecting an interstate commerce use—that is, affecting the federal as distinguished from any state function performed by the railway as a public carrier. At the hearing we invited further argument and briefing, but the able presentation on behalf of the State has not answered the question, "In what enterprise other than the intercommingled interstate and intrastate railroading is this use in storage for current repairs and replacements, without which the railroad could not operate?" Such storage use for current installation is use in interstate commerce in any realistic sense understood by industrialists and *and* merchants, (20 Fed. Supp. 943), and could be regarded otherwise only by the application of some "artificial standard" prohibited by Gregg Dyeing Co. v. Query, 286 U. S. 472, 480.

However, since our denial of the motion to dismiss, the Supreme Court has decided three cases dealing with the boundaries of state and federal taxation. Two of them, Western Live Stock v. Bureau of Revenue, 82 L. ed. 548, and Coverdale v. Arkansas & Louisiana Pipe Line Co., decided April 4, 1938, significantly expand the area of the states. A third, Helvering v. Mountain Producers Corp., 82 L. ed. 607, explicitly overrules long established concepts determining the respective taxing areas of both governments.

[fol. 110] It is suggested by the state's officers that since the thirteenth paragraph of that decision states:

"* * * In the light of the expanding needs of the State and Nation, the inquiry has been pressed whether this conclusion has adequate basis; whether in a case where the tax is not laid upon the leases as such, or upon the government's property or interest, but is imposed upon the gains of the lessee, like that laid upon others engaged in similar business enterprises, there is in truth such a direct and substantial interference with the performance of the government's obligation as to require immunity for the lessee's income."

Helvering v. Mountain Producers Corporation, 82 L. ed. 607, 611,

we may be required to reconsider our decision with a view to the expanding needs for revenue of the State of California, and they offer the enactment of the use tax itself as evidence of such need.

In the present emergency of dependent unemployed, California's need for revenue is of sufficient pressure to produce incandescence, but the emitted light does not show where the path of such a principle of determination will lead us.

What light we have on various interstate railways, performing a National public service as important in the body politic as the circulation of blood in the individual, seems to disclose correspondingly "expanding needs" for revenue to meet their expanding payrolls and interest on debt and, here, expanding taxes. Indeed, so pressing are their needs that only by the expanding use of federal funds is their federally regulated function prevented from transfer to federal courts and federal receivers. Already, for many railways, it has been transferred.

[fol. 111] We cannot believe that the language of the Mountain Producers case must be interpreted as imposing on us, first, a determination of the need for state taxation, and, if found, second, a reconsideration of our decision on the denial of the motion to dismiss with a view to a reversal of our holding there. Such a criterion would suggest another review and other overrulings if returning prosperity contracts rather than expands the state's need.

We prefer the alternative view of the state's brief that, just as the emergency of the depression and high rentals in the so-called Rent Cases, Block v. Hirsh, 256 U. S. 135; Marcus Brown Holding Co. v. Feldman, 256 U. S. 170, and Edgar A. Levy Leasing Co. v. Siegel, 258 U. S. 242, and also in the much later case of Home Building and Loan Asso. v. Blaisdell, 290 U. S. 398, induced the Congress and the Judiciary to the exploration of hitherto unused constitutional powers, so now the urgency of the more recently expanding functions of government in aid of the economic and social needs of the average man, also made poignantly clear by the world depression, requires both legislatures and courts to review the border line between state and federal taxing areas, as that was decided in cases when no such economic and social conditions existed or had been exposed.

Prior decisions considered in the overrulings by the Mountain Producers case present a more definite guide for determining its effect on the decision of this case. Among the cases considered is Indian Oil Co. v. Oklahoma, 240 U. S. [fol. 112] 522, holding invalid as an unconstitutional burden on a governmental function a tax on Indian land leases owned by the taxpayer. Here the tax was on the property itself of the taxpayer.

In three other cases, the income of the taxpayer from his leases is held not taxable. In Choctaw & Gulf R. R. v. Harrison, 253 U. S. 292, was held invalid a state tax on the lessee of a mine from the trustee of the mine for Choctaw and Chickasaw Indian tribes, wards of the federal government, based upon his gross sales of his coal. The court held that the lessee was "the instrumentality through which this (governmental) obligation is carried into effect". Such an agency cannot be subjected to an occupation or privilege tax by a state".

In Gillespie v. Oklahoma, 257 U. S. 501, the state tax on the income of leases owned by the taxpayer was held invalid on the same reasoning, as was the federal tax on the income of the owner of state leases in Burnet v. Coronado Oil & Gas Co., 285 U. S. 393.

In all these cases the tax on the taxpayer's property or his income incidental to its ownership is regarded as potentially destructive of the governmental function served by the taxpayer in the exercise of its ownership.

In the Mountain Producers case the tax was upon the income from the leases, and the court states the overruling principle to be:

"* * * And where it merely appears that one operating under a government contract or lease is subjected to a tax with respect to his profits on the same basis as others who are engaged in similar businesses, there is no suffi- [fol. 113] cient ground for holding that the effect upon the Government is other than indirect and remote. We are convinced that the rulings in Gillespie v. Oklahoma, 257 U. S. 501, 66 L. ed. 338, 42 S. Ct. 171, supra, and Burnet v. Coronado Oil & Gas Co. 285 U. S. 393, 76 L. ed. 815, 52 S. Ct. 443, supra, are out of harmony with correct principle and accordingly they should be, and they now are, overruled."

Helvering v. Mountain Producers, supra, 613.

However, preceding this sentence regarding taxation on such income is another stating the broader principle permitting taxation on property of private persons, formerly regarded as having the character of governmental agents because of their leases or contracts with the government. This statement is so significantly joined by the word "and" to the succeeding above quoted sentence, that we are constrained to believe it to be the broader ratio decidendi of the case. The preceding sentence is (pp. 612, 613):

"These decisions in a variety of applications enforce what we deem to be the controlling view—that immunity from non-discriminatory taxation sought by a private person for *his property* or gains because he is engaged in operations under a government contract or lease cannot be supported by merely theoretical conceptions of interference with the functions of government. Regard must be had to substance and direct effect." (Emphasis supplied.)

If, then, the private person dealing with the federal government with reference to his property is subject to state taxation, an occupation tax on that person in the use of his property would seem equally valid.

If this be so, the principle established is inconsistent with that controlling in Graves v. Texas Co., 298 U. S. 393, 401, [fol. 114] cited by the Railway as controlling here. There a contractor agreed to sell gasoline to the government. It was his property until delivery to the government. Prior to delivery it had to be stored and withdrawn from storage. He was taxed by the state of Alabama for this use of storage and withdrawal while still his property.

The court in the Graves case states that this tax increases the government's cost by the amount of the tax levy. However, it seems clear that because the increased cost is so measurable, the principle is no different from the sales tax on the coal in the Choctaw case. It is just as certain that the government will receive less for the coal lease as that it will pay more for the gasoline. One is no more direct than the other. Both are levied on the owners of gasoline and coal while the government has no title in either.

Shortly before the Mountain Producers decision was that in Western Live Stock v. Bureau of Revenue, 82 L. Ed. 548. There a non-discriminatory tax on gross receipts from the sale of advertising in a periodical printed in one state and circulated in that and in other states is held valid as on an intrastate activity. The fact that it increases the cost of producing advertising, which has its value because of its interstate circulation, is not controlling.

The latest of these tax cases, decided April 4, 1938, follows normally the trend of these decisions. In Coverdale v. Arkansas & Louisiana Pipe Line Co. the party taxed was engaged in the interstate delivery of petroleum gas through a pipe line. It maintained several pumps in the [fol. 115] state of Louisiana, the power from which traveled interstate with the gas it moved. The state levied an occupation tax on the use of the pumps, measured by the amount of power going into an intermingled intra and interstate distribution. The court held that because (1) the tax was non-discriminatory and (2) the pump itself was stationary within the state and itself did not move with the power it created, the tax on its use did not have a direct effect on interstate commerce and hence was a valid exercise of the state's right to tax.

When California's use tax on the Railroad is considered in connection with the principles established in the preceding cases, we are compelled to the conclusion that the reasoning on which we distinguished it from the cases of Nashville etc. Ry. v. Wallace, 288 U. S. 249, and Edelman v. Boeing Air Transport Co., 289 U. S. 249, is not controlling. It is true that the standby material here stored for the necessary maintenance of a great interstate railway is dedicated to an interstate use, but so are the pumps in the Coverdale case. Railways could not run unless their spare parts and maintenance supplies were used in the storage from which they were currently drawn, but neither could the gas and oil be driven in interstate commerce unless the owner used the pumps.

For the purposes of this case the dividing line is the same as in the Nashville and Edelman cases, even though in those cases there was no proof that the fuel was dedicated to an exclusive use to create power in interstate transportation. It is that the storage use and withdrawal use are prior to the actual installation of the parts and rails [fol. 116] in the locomotive and cars and in the roadbed. Until then the increased cost, although it is paid by the passengers and freight owners, is an "*indirect*" burden on interstate commerce. Did not the Coverdale case seek to distinguish between the Nashville and Edelman cases and Helson v. Kentucky, 279 U. S. 345, we should be inclined to hold that the latter case was overruled and, though a direct burden, the tax was as valid as the direct ad valorem tax on the railroad's property itself. In logic, as pointed out by Mr. Justice Stone in his concurrence in the Helson case, the one is as justifiable a method of collecting from the railway what it owes the state government for its services in state governmental protection, as is the other.

We find the facts to be as stipulated and agreed by the parties. From those facts we conclude that the threatened enforcement of the California Use Tax Act will not impose a direct or undue burden on plaintiff's interstate commerce business.

The permanent injunction is denied and the bill dismissed.

William Denman, United States Circuit Judge. Michael J. Roche, United States District Judge. A. F. St. Sure, United States District Judge.

May 3, 1938.

[File endorsement omitted.]

[fol. 117] IN UNITED STATES DISTRICT COURT

[Title omitted]

FINDINGS OF FACT AND CONCLUSIONS OF LAW PROPOSED BY DEFENDANTS—Filed June 6, 1938

[fol. 118] This case came on for hearing on defendants' motion to dismiss the bill of complaint and to dissolve the interlocutory injunction issued herein, and on plaintiff's application for a permanent injunction. Notice of hearing of plaintiff's application for a permanent injunction was duly given in accordance with section 266 of the Judicial Code (United States Code, Title 28, sec. 380). The plaintiff appeared by its counsel, Pillsbury, Madison & Sutro, by Francis N. Marshall, Esq., and defendants appeared by Honorable U. S. Webb, Attorney General of the State of California, by H. H. Linney and James J. Arditto, Deputies Attorney General. The court having heard the parties and their counsel, and having considered plaintiff's verified bill of complaint and defendants' answer, together with defendants' motion to dismiss the bill of complaint and to dissolve the interlocutory injunction and plaintiff's application for a permanent injunction, and having rendered its opinion that plaintiff's application for a permanent injunction should be denied and the bill of complaint be dismissed, makes the following findings of fact and conclusions of law which constitute the grounds of its order denying the plaintiff a permanent injunction herein and dismissing the bill of complaint, as follows:

Findings of Fact

1. Plaintiff is and at all times pertinent to the issues in this action was a corporation duly organized and existing under and by virtue of the laws of the State of California, and a citizen and a resident of said State of California.

2. For many years last past and at all times pertinent to the issues in this action plaintiff has been and now is a telephone and telegraph company engaged exclusively in interstate and intrastate telephone and telegraph commerce and business.

[fol. 119] 3. At the time of the commencement of this action the defendant John C. Corbett was a citizen and resident of the State of California, residing in San Francisco in

said state; the defendant Fred E. Stewart was a citizen and resident of the State of California, residing in the City of Oakland in said state; the defendant Richard E. Collins was a citizen and resident of the State of California, residing in the City of Redding in said state; the defendant Ray L. Edgar was a citizen and resident of the State of California, residing in the City of San Diego in said state; and the defendant Ray L. Riley was a citizen and resident of the State of California, residing in the City of Sacramento in said state, and said persons constituted the State Board of Equalization of the State of California.

During the pendency of this action the defendant Ray L. Riley resigned as a member of said State Board of Equalization and Harry B. Riley, a citizen and resident of the State of California, was appointed by the Governor of the State of California as Controller of said state and ex-officio member of said State Board of Equalization, and the said Harry B. Riley, as a member of said State Board of Equalization, has been duly substituted as a defendant herein, and his appearance has been duly entered herein.

During the pendency of this action the defendant Ray L. Edgar died and William G. Bonelli, a citizen and resident of the State of California, was appointed by the Governor of the State of California as a member of said State Board of Equalization in his place and stead, and the said William G. Bonelli, as a member of said State Board of Equalization, has been duly substituted as a defendant herein, and his appearance has been duly entered herein.

The State Board of Equalization of the State of California, as constituted at the time of the commencement of this action and as now constituted by the resignation of the said [fol. 120] Ray L. Riley and the appointment of the said Harry B. Riley, and by the death of said Ray L. Edgar and appointment of said William G. Bonelli, was at all times pertinent to this action and now is an official board, organized and existing under and by virtue of the Constitution and laws of the State of California.

The defendant U. S. Webb at the time of the commencement of this action was and now is a citizen and resident of the State of California, residing in the City and County of San Francisco, and was and is duly elected, qualified and acting Attorney General of the State of California.

4. Western Electric Company, Incorporated, at all times pertinent to this action was and now is a corporation duly

organized and existing under and by virtue of the laws of the State of New York, and a citizen and a resident of said State of New York. Said company at said times maintained and now maintains two places of business in the State of California, to wit, one at the City of Emeryville, County of Alameda, State of California, and another at the City of Los Angeles, County of Los Angeles, State of California.

5. The tax complained of in this case is claimed to be due under the Use Tax Act of 1935 of the State of California, being chapter 361 of the Statutes of 1935 of said state, which at all times pertinent to this action has been and now is in full force and effect. The copy of said Act attached to the bill of complaint herein is a true copy.

Hereinafter in these findings the use of the present tense indicates a continuous course of action during all of the times material to the issues in this case.

6. Plaintiff's telephone and telegraph system extends into several states and is connected with other telephone and telegraph systems, and, by means of its said telephone and telegraph system and said connections with other telephone and telegraph systems, plaintiff handles a great number of [fol. 121] interstate communications and does a great volume of interstate business.

7. The plaintiff's interstate and intrastate telephone and telegraph commerce and business are inextricably intermingled. Plaintiff's interstate and intrastate telephone and telegraph system includes plant and equipment sufficient to enable it to render efficient and economical telephone service according to the demand of the public for such telephone service, including both interstate and intrastate service. It is not feasible, economically or practically, for a corporation engaged, as the plaintiff is, in an inextricably intermingled interstate and intrastate telephone and telegraph commerce and business, to provide separate state-wide telephone and telegraph systems, one for the interstate business and the other for the intrastate business of such corporation.

8. Plaintiffs interstate and intrastate telephone and telegraph system, and all of plaintiff's capital (with relatively small exceptions not material to this action), including plant and operating capital, are exclusively devoted inextricably and indiscriminately to interstate and intrastate telephone and telegraph service, commerce and business, the same

plant, facilities and organization being devoted indiscriminately to and used indiscriminately in such interstate and intrastate service. Reference hereinafter in these findings to plaintiff's "telephone and telegraph system" and to plaintiff's "telephone and telegraph business" means and is reference to plaintiff's telephone and telegraph system devoted inextricably and indiscriminately to interstate and intrastate telephone and telegraph service, and to plaintiff's inextricably intermingled interstate and intrastate telephone and telegraph commerce and business.

9. In the necessary operation, maintenance and repair of its telephone and telegraph system, plaintiff purchases from [fol. 122] Western Electric Company, Incorporated, hereinafter called "Western Electric," large amounts of tangible personal property consisting of equipment, apparatus, materials and supplies for use as integral parts of and exclusively in and in common for its interstate and intrastate telephone and telegraph commerce and business. Plaintiff purchases all of said tangible personal property in accordance with the purposes, plan and methods hereinafter described in findings Nos. 20, 21, 22, 23, 28, 29 and 30 hereof, and for the sole and exclusive purpose of making it a part of plaintiff's said telephone and telegraph system and of using it indiscriminately and in common in and for the conduct of plaintiff's inextricably intermingled interstate and intrastate telephone and telegraph commerce and business, and of doing and performing all of the acts and things with respect to such property, including holding and retention thereof in the State of California, which are hereinafter described. Said purchases are made at points outside the State of California, and said equipment, apparatus, materials and supplies are shipped in interstate commerce by Western Electric to plaintiff at various points in the state.

10. Plaintiff intends to, and will in the future, continue to purchase from Western Electric, at points outside the State of California, like and other equipment, apparatus, materials and supplies for its purposes in conducting its said interstate and intrastate telephone and telegraph business.

11. The tangible personal property involved in this action is of two general classes: goods purchased on specific orders for installation at a particular place and to serve a particular purpose in the plaintiff's telephone and telegraph system

hereinafter called "specific order equipment"; and goods purchased from time to time for holding as stand-by facil- [fol. 123] ities to meet fluctuating demands and emergencies resulting from changes in the public demand for service and to make repairs necessitated by the casual destruction of plaintiff's property, etc., hereinafter called "stand-by facilities."

12. During the quarterly periods of three months which ended respectively June 30, 1936, September 30, 1936, December 31, 1936, March 31, 1937, June 30, 1937, September 30, 1937, December 31, 1937 and March 31, 1938, plaintiff purchased from Western Electric at points outside the State of California tangible personal property of the character hereinabove described for the total sales or purchase price of $6,977,623.66. The respective amounts of the purchase price of the specific order equipment, the stand-by facilities, and the total tangible personal property so purchased by plaintiff from Western Electric during said eight quarterly periods, and the respective amounts of the total tax claimed by defendants to be due on account thereof under the terms of the Use Tax Act of 1935 of the State of California, are as follows:

Quarter ending	Price of specific order equipment	Price of stand-by facilities	Total price of tangible personal property	Tax claimed to be due
June 30, 1936	$435,082.00	$116,387.00	$551,469.00	$16,544.07
Sept. 30, 1936	1,631,653.00	11,488.00	1,643,141.00	49,294.23
Dec. 31, 1936	569,801.00	56,433.00	626,234.00	18,787.02
Mar. 31, 1937	471,135.21	103,000.33	574,135.54	17,224.07
June 30, 1937	825,326.56	40,235.76	865,563.32	25,996.90
Sept. 30, 1937	745,530.00	28,597.00	774,127.00	23,223.81
Dec. 31, 1937	610,104.00	26,800.00	636,904.00	19,107.11
Mar. 31, 1938	1,272,182.24	33,867.56	1,306,049.80	39,181.49

13. The estimated amount of the sales or purchase price of tangible personal property which plaintiff, during each succeeding quarterly period as defined in said Use Tax Act [fol. 124] of 1935, will purchase in interstate commerce at points outside the State of California, and which will be shipped to plaintiff to points within the State of California for use in the operation and conduct of plaintiff's said interstate and intrastate telephone and telegraph business, will amount to approximately $360,000; and the estimated amount of the taxes which the defendants intend to and will claim to be due from plaintiff on account of the said sales or purchase price of said property under said Use Tax Act of 1935 and the rulings and regulations made by said defend-

Items

[Note instruction 8]

Aisle—lighting equipment.
Balconies for distributing frames.
Banks—connector, selector.
Batteries.

[Here follows continuation of alphabetical list of items of equipment.]"

The operating expense accounts include, among others, a number of repair accounts. Typical of the specifications for these repair accounts are the specifications for the account of repairs of pole lines, which are as follows:

"602.1. Repairs of pole lines.—This account shall include the cost of repairing pole lines and the cost of maintaining right of way therefor.

[Here follows list of items.]"

The uniform system of accounts also prescribes an account of material and supplies, described as follows:

"122. Material and supplies.—(A) This account shall include the cost of unapplied material and supplies held in stock, including plant supplies, tools, fuel, stationery, directory paper stock, and other supplies; and material and articles of the company in process of manufacture for supply stock."

[fol. 127] 18. Immediately upon the purchase of the articles of tangible personal property hereinabove mentioned they became and are subject to accounting in the manner and form hereinabove described.

19. Specific order equipment consists of central office switchboards, frames, cable racks, large private branch exchange switchboards, large underground cables, switches, central office cable, wire, protectors and other component parts of telephone and telegraph lines.

20. The plaintiff orders all of the specific order equipment for immediate installation in the manner hereinafter described in findings Nos. 24 and 25 hereof at particular points in plaintiff's telephone and telegraph system and to serve particular purposes and needs in the system. Plaintiff pur-

chases equipment of this class for four general purposes: (1) to meet the public demand for telephone and telegraph service in territories in which plaintiff is operating and offering such service, in accordance with plaintiff's obligations as a corporation engaged in and rendering telephone and telegraph service, (2) to improve existing service, as part of a service improvement program, (3) to render existing service at less cost, as part of a general economy program, and (4) to make plant changes necessary to maintain the efficiency of plaintiff's system, and to conform to changes in public ways, rights of way, and public requirements. The plaintiff periodically makes an estimate of its equipment needs for the purposes above mentioned. This estimate is based upon (1) a survey by plaintiff's commercial department of the expected growth of telephone business in each locality and in connection with each exchange, (2) an estimate by plaintiff's traffic engineers of the equipment necessary to take care of the growth of business [fol. 128] and to fulfill plaintiff's service improvement and economy programs, and (3) an estimate by plaintiff's equipment engineers of the actual equipment specifications to fill the equipment needs found by the traffic engineers. As a matter of practical economy, such an estimate provides for the least practical quantities of equipment required for the particular purpose to be served.

21. To meet a need thus disclosed at a particular point and for a particular purpose in plaintiff's telephone and telegraph system, plaintiff's engineers draw up a "project" containing the equipment specifications and costs necessary to fulfill this need in the most efficient and most economical manner, and in the manner best calculated to serve the public. Plaintiff's equipment engineers reduce the project to its detailed specifications—the number of frames, the number and type of switches, size and arrangement of trunk groups, etc.—with supplemental explanatory drawings. The project, if it involves a large expenditure, is then submitted to plaintiff's executive officers and board of directors for approval and authority to make the expenditure; if the expenditure is small, the project is submitted to some other designated official of plaintiff.

22. When a project is thus approved and the necessary expenditure authorized, plaintiff's engineers prepare an order or "requisition," and forward it to Western Electric.

In the case of central office equipment and private branch exchange switchboards, the requisition is accompanied by the detailed specifications and drawings.

23. Western Electric manufactures specially—i. e., makes to order and according to plaintiff's particular specifications, as to each article of equipment—central office switchboards, large private branch exchange switchboards, large [fol. 129] underground cables, switches, frames, cable racks, etc., thus ordered by plaintiff. It may manufacture specially, or may take out of existing stock, items such as central office cable, wire, and protectors. By far the larger part of the specific order equipment is not manufactured by Western Electric until it receives orders therefor, and is then manufactured according to plaintiff's particular specifications as to each article of equipment; and its stock of other equipment is manufactured after receipt from plaintiff of a "preview" of anticipated orders, which, when they are given, can be filled out of such stock. All of the specific order equipment is especially designed for use in the operation of a telephone and telegraph system, and is peculiarly adapted to telephone and telegraph uses and is not suitable for any other use.

24. A single exception to some of the statements of fact hereinabove contained exists in the following particular: the category of specific order equipment includes a small number of exchange telephone poles (which are of a different specification, size and weight, being larger and heavier, than are toll poles and other exchange poles which are purchased by plaintiff for, and are peculiarly adapted to, plaintiff's own exclusive use as aforesaid) with the plan and for the purpose of using them, under joint pole agreements, jointly with power companies, light companies, etc., for carrying plaintiff's telephone and telegraph wires and also the wires of such other companies. The purchase and use of joint poles in this manner is an ordinary and customary practice in the conduct of a telephone and telegraph business such as that of the plaintiff. Plaintiff receives payment from such other company or companies for the right and interest of such other company or companies in and to their joint use of such joint poles. Plaintiff's use of such joint poles is exclusively for and in the conduct of its interstate [fol. 130] and intrastate telephone and telegraph commerce and business as aforesaid, and is by means of crossarms

and other equipment peculiarly adapted to telephone and telegraph uses as aforesaid and not suitable for any other use.

25. Specific order equipment, after the termination of the interstate shipment thereof, is installed either by plaintiff's employees or by experts in the employ of an agency hired by plaintiff to make specific installations. In either case, plaintiff orders and Western Electric arranges delivery at times which not only are appropriate to the desired time for completion of each installation project but also coincide with times when the installers will be available to make the installation. Western Electric ships the goods, when ready, by public carrier, consigned to plaintiff at the place of use. When plaintiff is informed that the goods have arrived, plaintiff sends its trucks to be at the dock or railroad car at the time when, as plaintiff is informed, the goods will be ready for delivery and available for unloading. Plaintiff's representative receipts for the goods at the dock or breaks the seal of the railroad car, as the case may be, and plaintiff's employees unload the goods directly from the dock or car into the trucks. Generally the trucks are driven directly to the building in which the equipment is to be installed; but in handling some kinds of equipment in large metropolitan centers, for reasons of economy in trucking, the equipment is sometimes carried first to a distributing center and there reloaded into other trucks which carry it to the building in which it is to be installed. The equipment is then moved directly from the truck into the building to the place of installation. On the arrival of the equipment at the place of installation, the installers commence installation immediately and the installation is a continuous proc-[fol. 131] ess, except as this statement is qualified by the matters stated in finding No. 26.

26. There is no holding, in any warehouse, storeroom or other like place of deposit, of any of the specific order equipment after the termination of the interstate shipment and the plaintiff's receipt thereof; however, time intervals during which such equipment is retained or held in the possession of the plaintiff, and is not in motion in the course of installation thereof, occur between the time of termination of the interstate shipment thereof and the time when the installation of such equipment is completed and said equipment is available, as physically connected parts of

plaintiff's telephone and telegraph plant, for carrying interstate and intrastate communications for the public; said time intervals being such as occur when individual pieces of equipment are momentarily at rest on plaintiff's truck after being loaded thereon from the dock or car and before the truck starts to its point of destination, and such as occur when individual pieces of equipment are set down at the place where they are to be physically connected with plaintiff's plant and before further movement or handling thereof in the course of installation can proceed. In practically all installation projects the process of connecting parts of the equipment with and into plaintiff's physical plant is under way before the gathering of all equipment involved in the project at the place of connecting the same with said plant is complete. There is no retention or holding of any of said equipment except such as necessarily occurs in the ordinary and efficient course of transporting said equipment to its ultimate destination and installing it as physically connected parts of plaintiff's telephone and telegraph plant.

With reference to private branch exchange switchboards only, in exceptional instances it occurs that a subscriber [fol. 132] orders such a switchboard for installation at a particular time, and that, because of construction delays and for like reasons, the place where such switchboard is to be installed is not ready when plaintiff receives such switchboard at the end of the interstate shipment thereof. Plaintiff then holds such switchboard at some convenient place until the place of installation is ready, and then installs the same as hereinabove described. The period of such holding, in the experience of plaintiff, rarely exceeds a few days.

27. When plaintiff receives specific order equipment from Western Electric, as hereinabove described, plaintiff's accounting department, pursuant to the said accounting rules and regulations and uniform system of accounts for telephone companies, charges to its repair accounts (being accounts of plaintiff's expenses of operating its said interstate and intrastate telephone and telegraph system, as hereinabove described) the cost of such part of the equipment as is installed in plaintiff's plant for the purpose of making repairs, and to its appropriate plant accounts (being accounts of plaintiff's capital devoted to the telephone and telegraph service, as hereinabove described) the cost of

such part of the equipment as constitutes new additions in plaintiff's telephone and telegraph system.

28. In the interest of prompt and efficient public service and in the performance and discharge of its obligations to the public as a corporation engaged in and rendering telephone and telegraph service, plaintiff is required and compelled to have supplies to meet current requirements distributed over its entire telephone and telegraph system in quantities and at the times necessary to anticipate regular current requirements, and to have such reserves in quantities necessary to meet constantly fluctuating demands and emergencies which result from changes in the public de- [fol. 133] mand for service and the repairs which from time to time are unavoidably made necessary by the destruction of property by reason of fires, storms and other weather conditions and unavoidable casualties and ordinary wear and tear which occur in connection with conducting its telephone and telegraph commerce and business.

29. Stand-by facilities purchased by plaintiff from Western Electric at points outside the state consist of small private branch exchange switchboards, teletypewriter equipment, cable, loading coils, poles, crossarms, wood conduits and a small amount of copper wire. Private branch exchange switchboards and teletypewriter printers comprise by far the largest part of the stand-by facilities. All of such stand-by facilities are especially designed for use in the operation of a telephone and telegraph system, and are peculiarly adapted to telephone and telegraph uses and are not suitable for any other use.

30. To replenish supplies of stand-by facilities, plaintiff's supply department places orders with Western Electric approximately once a month. As a matter of practical business economy, plaintiff thus orders periodically only such quantities of stand-by facilities as it determines to be necessary in the conduct and operation of its said telephone and telegraph business and system to meet current requirements, emergency demands, repairs, and wear and tear, as above stated.

31. Western Electric ships such stand-by facilities by carrier, consigned to plaintiff at central points of its tele-

phone and telegraph system. When notified of the arrival of the goods plaintiff sends trucks to pick them up at the dock or railroad depot. Plaintiff's employees unload the goods directly into the trucks and carry them, in accordance with the needs and purposes for which they were ordered, [fol. 134] to the places where plaintiff keeps stores of such stand-by facilities, or in some instances, for reasons of economy in trucking, to a distributing center, there to be reloaded into other trucks which carry them to the places where plaintiff keeps stores of stand-by facilities. After the termination of the interstate shipment of such stand-by facilities, and upon their arrival at the said places where plaintiff keeps its stores of stand-by facilities, plaintiff retains and holds them in said stores as stated in finding No. 32.

32. Plaintiff retains and holds and keeps on hand, in storage space provided by it in the State of California at strategic points—i.e., at points suitable for prompt distribution of stand-by facilities as needed—over its entire telephone and telegraph system, private branch exchange switchboards and teletypewriter equipment, and small stores of poles, cable and loading coils. Plaintiff keeps its stores of such materials in quantities necessary to meet current requirements and the constantly fluctuating demands and emergencies which result from changes in the public demand for service and the repairs which from time to time are unavoidably made necessary by the destruction of property by reason of fires, storms and other weather conditions and unavoidable casualties and ordinary wear and tear which occur in connection with conducting plaintiff's telephone and telegraph business.

33. The distribution by plaintiff of stand-by facilities to stores located at strategic points over plaintiff's telephone and telegraph system, and the holding of such stand-by facilities in these stores, as hereinabove described, is necessary to insure the rendition by plaintiff, as efficiently and as free from interruption as possible, of interstate and intrastate telephone and telegraph service.

34. When repairs become necessary to any part of plain- [fol. 135] tiff's telephone and telegraph system, plaintiff's employees who are charged with making such repairs take out of plaintiff's stores such of said stand-by facilities as

are necessary to make the repairs. When any person makes a demand for a private branch exchange switchboard or for teletypewriter equipment, supplies of this nature are taken out of plaintiff's stores on disbursement tickets to meet service orders. Plaintiff's installer-repairmen take these supplies out of the stores, take them to the place where they are needed and make the necessary installation.

35. Between the time when said stand-by facilities are taken from plaintiff's stores as above described and the time when the installation of such facilities is completed and said facilities are available, as physically connected parts of plaintiff's telephone and telegraph plant, for carrying interstate and intrastate communications for the public, time intervals occur during which such facilities are retained or held in the possession of the plaintiff and are not in motion in the course of installation thereof; said time intervals being such as occur when individual pieces of equipment are momentarily at rest on plaintiff's truck after being loaded thereon from plaintiff's stores and before the truck starts to its point of destination, and such as occur when individual pieces of equipment are set down at the place where they are to be physically connected with plaintiff's plant and before further movement or handling thereof in the course of installation can proceed. After such stand-by facilities are taken from plaintiff's stores as above described, there is no retention or holding of any of said facilities except such as necessarily occurs in the ordinary and efficient course of transporting said facilities to their ultimate destination and installing them as physically connected parts of plaintiff's telephone and telegraph plant.

[fol. 136] 36. When plaintiff receives such stand-by facilities from Western Electric, as hereinabove described, plaintiff's accounting department, pursuant to the said accounting rules and regulations and uniform system of accounts for telephone companies, charges the cost thereof to its "Materials and Supplies" account. Upon taking such supplies from its stores, plaintiff credits them to its said "Materials and Supplies" account, and charges them to its repair accounts if they are installed in plaintiff's plant for the purpose of making repairs, or to the appropriate plant accounts if they constitute new additions in plaintiff's plant.

37. The installation of all of said equipment, facilities, apparatus and materials is for the sole purpose of making said articles available as physically connected parts of plaintiff's telephone and telegraph plant for carrying interstate and intrastate communications for the public, and is necessary to that end.

38. In accordance with said accounting rules and regulations and uniform system of accounts, plaintiff charges the cost of carrying said articles by truck from the dock or railroad to the place of installation (including the cost of use of the trucks and the wages of the truckmen) and the cost of installation (including the wages of plaintiff's employees engaged in installation and the amounts paid to installers hired from time to time) to its appropriate repair accounts or plant accounts as a part of the cost of said repairs or additions to plant.

39. When said articles of tangible personal property are physically connected with the plaintiff's telephone and telegraph plant they become and are a part of the facilities by which plaintiff's subscribers, and others who avail themselves of the telephone and telegraph service offered by the plaintiff, command at their pleasure the service they desire, [fol. 137] whether interstate or intrastate; and all of said articles of tangible personal property, including specific order equipment and stand-by facilities, when the same are available, as physically connected parts of plaintiff's telephone and telegraph plant, for carrying interstate and intrastate communications for the public, are used by plaintiff exclusively in and for the operation and maintenance of plaintiff's telephone and telegraph system and indiscriminately and in common in and for conducting its inextricably intermingled interstate and intrastate telephone and telegraph commerce business.

40. If the tax, the collection of which is sought by this action to be enjoined, should be paid, said tax would be paid out of plaintiff's capital devoted to the telephone and telegraph service as hereinabove stated, and would be a charge to plaintiff's operating expense accounts or plant accounts as part of the cost of the tangible personal property, on account of which such tax should be paid, and which cost is charged to plaintiff's operating expense accounts and plant accounts as hereinabove described. If said tax should be

required to be paid, it would be a charge to and become a cost of conducting plaintiff's inextricably intermingled interstate and intrastate telephone and telegraph commerce and business.

41. By reason of its inextricably intermingled interstate and intrastate commerce and business plaintiff is compelled to purchase from Western Electric, at points outside the State of California, a greater amount of tangible personal property than it would be required to purchase if it were engaged only in intrastate telephone and telegraph business. This is true because (1) a substantial quantity of plaintiff's equipment, such as pole lines between the state lines and cities near the border of California, and direct wires running from central offices and toll offices in large municipalities in California to large municipalities in other states, [fol. 138] together with the portions of switchboard and other equipment connected therewith, are used for carrying interstate communications only and handle no intrastate business, (2) the amount of a large part of the central office equipment and other equipment which plaintiff necessarily maintains and operates in the conduct and operation of its telephone and telegraph business as aforesaid, is determined by the amount of traffic, including both interstate and intrastate telephone and telegraph communications, which it bears, and (3) plaintiff is informed and believes that some undetermined part of its equipment is necessarily maintained and operated in order to serve subscribers and patrons who would not demand or request telephone and/or telegraph service unless interstate as well as intrastate service were held out by plaintiff to such subscribers and patrons.

42. Notwithstanding that none of the property aforesaid was, is or will be used exclusively and separately by the plaintiff in conducting intrastate telephone and telegraph business, but that all of it is used as hereinbefore stated, defendants have demanded of the plaintiff the taxes aforesaid, under the provisions of Ruling No. 11 of the defendant, said State Board of Equalization, promulgated on or about February 6, 1936, which said ruling is as follows:

"The fact that tangible personal property is purchased in interstate or foreign commerce does not exempt from the tax the storage, use or other consumption of such property

in this State after the shipment of the property in interstate or foreign commerce has ended.

The fact that tangible personal property is used in this State in interstate or foreign commerce following its storage in this State does not exempt the storage of the property from tax. The tax does not apply to the use or storage of property purchased for use in interstate or foreign commerce and actually placed in use in interstate or foreign commerce prior to its entry into this State."

43. Under said act, said defendants, and each of them, [fol. 139] claim that there is due from, and payable by, plaintiff, taxes on all plaintiff's purchases of tangible personal property described in findings Nos. 9, 10, 11 and 12 hereof, and demand payment thereof, and if the plaintiff should fail or refuse to pay such taxes so demanded, said defendants, and each of them, intend and directly and expressly threaten to, and, unless restrained by the judgment or order of this court, will, in pursuance of their said expressed intention, institute and cause to be instituted summary suits or other proceedings to compel the said payment of said tax, interest and penalties provided by said act.

Defendants, and each of them, further threaten, in accordance with the procedure laid down in said act, to cause summary process to be issued for the seizure and sale of personal property of plaintiff used by plaintiff as instrumentalities of interstate commerce in the necessary operation, maintenance and repair of its said telephone and telegraph system, and thereby plaintiff's said business will be interfered with and plaintiff will be prevented from conducting its said telephone and telegraph business to its great and irreparable damage in the sum of more than $50,000, for which damages defendants are not financially able to respond and for which plaintiff has no adequate remedy at law. Defendants, and each of them, threaten to and will bring repeated suits against plaintiff for further quarterly installments of said tax and subject plaintiff to a multiplicity of suits and harassing litigation to plaintiff's great and irreparable damage.

44. The payment of said taxes would require plaintiff to pay to said Western Electric, on or before August 14, 1936, being the time fixed by said Use Tax Act of 1935, as extended by said Board, the several large amounts of tax for the quarterly period ending June 30, 1936, hereinbefore stated, and on or before the 15th day of the month follow-

[fol. 140] ing each subsequent quarterly period of three months the amounts of tax payment for such subsequent quarterly period, and to suffer the loss of use of such money and the earning value thereof until recovered by suit, if recoverable at all, and in order to comply with the requirements of the said act and the demands of said defendants and each thereof, it is necessary for the plaintiff to incur substantial expenses in tax accounting and in keeping records of information concerning purchases and the uses of such properties necessary to defend its rights against the imposition of such taxes and it will be necessary to continue such accounting unless relieved from the necessity so to do and to pay such taxes by the injunction sought in this proceeding, and such expenses, if so incurred, will constitute a substantial and irreparable loss to the plaintiff.

45. The only remedial procedure prescribed by said act for the recovery of taxes paid or which may be paid by the plaintiff under said act is to make payment of such taxes under protest and bring an action for the recovery thereof within a short period of limitation, to wit (as said act provided at the commencement of this action and thereafter until July 1, 1937), sixty days following the payment thereof, and to wit (as said act, having been amended July 1, 1937, by chapter 683 of the Statutes of 1937 of the State of California, provided from and after July 1, 1937, and now provides), one year following the payment thereof, against the State Treasurer of the State of California, in a court of competent jurisdiction in the County of Sacramento, for the recovery of the amount of taxes paid under protest; and the phrase "a court of competent jurisdiction in the County of Sacramento" is intended to mean and means a state court of competent jurisdiction, being the Superior Court of said county; and such provision of the act is not intended to provide for an action in the federal court.

[fol. 141] Conclusions of Law

(1) The court has jurisdiction of all of the parties hereto and of the subject-matter of this action.

(2) This suit arises under the Constitution of the United States.

(3) The imposition of the California Use Tax upon the acts and transactions found in the foregoing findings of

ants in connection therewith, will, unless the collection of said tax is restrained by injunction, amount to the sum of approximately $12,000.

14. All of the articles of tangible personal property hereinabove described are purchased by plaintiff through use of operating capital, consisting of money or current assets definitely devoted to the telephone and telegraph service, or through the credit of plaintiff as a telephone and telegraph company engaged in such telephone and telegraph service.

15. All of said articles of tangible personal property hereinabove described are necessary to the efficient and economic operation of plaintiff's telephone and telegraph system, and the purchases thereof are made in the manner hereinafter described and at the times and in the amounts necessary to meet the needs of plaintiff's telephone and telegraph business. Plaintiff considers said articles from the time of their purchase as a part of plaintiff's said telephone and telegraph system and as instrumentalities devoted to the operation and conduct of plaintiff's telephone and telegraph business.

16. Plaintiff engages in no business other than its said inextricably intermingled interstate and intrastate telephone and telegraph commerce and business. The said [fol. 125] articles, by reason of their nature, and by reason of the purpose for which and the particular specifications by which they are manufactured, as hereinafter described, are not, after their purchase by plaintiff from Western Electric, as hereinabove described, readily or practically salable by plaintiff to other persons, and plaintiff does not divert and has no practical way of diverting any of said articles to any use other than their intended use in plaintiff's said inextricably intermingled interstate and intrastate telephone and telegraph commerce and business.

17. Plaintiff keeps the accounts of its said telephone and telegraph business according to the accounting rules and regulations and the uniform system of accounts for telephone companies promulgated and prescribed by the Federal Communications Commission. The uniform system of accounts contains telephone plant accounts, described as follows:

"Telephone Plant Accounts

20. Purpose of telephone plant accounts.—(A) The telephone plant accounts (201 to 277, inclusive) are designed to show the original cost (note instruction 3–S.1) of the company's telephone plant (note instruction 3–BB) which ordinarily has a service life of more than 1 year, including such plant whether used by the company or others in telephone service (note instruction 3–AA); also the original cost of franchises, patents, rights of way, leaseholds and other interests in land. It shall also include the general expenses of organization of the accounting company."

and operating expense accounts, described as follows:

"Operating Expense Accounts

60. Purpose of operating expense accounts.—The operating expense accounts (602.1 to 677 inclusive) are designed to show the expenses of furnishing telephone service (note instruction 3–AA), including expense of maintaining the plant used in such service. (Note also instructions 4, 5, and 6.)"

Telephone plant accounts include, among others, accounts of central office equipment, station apparatus, station in- [fol. 126] stallation, pole lines, aerial cable, buried cable, aerial wire, underground conduit, and furniture and other office equipment. Typical of the specifications for these accounts are the specifications for the central office equipment account, which are as follows:

"221. Central office equipment.—(A) This account shall include the original cost (note instruction 3–S.1) of electrical instruments, apparatus, and equipment, other than station equipment, in central offices (including terminal and test rooms), repeater stations and test stations used in transmitting traffic and operating signals, and similar equipment in operators' schools and other centralized locations.

(B) This account shall also include the original cost of operators' chairs, wire chiefs' tools, desks and tables equipped with central office telephone equipment, and other furniture, fixtures, and equipment designed specifically for use in central offices, repeater stations, etc., or installed as a part of the electrical equipment therein. (See also note A to this account.)

fact to have occurred with respect to the tangible personal property described in said findings of fact, after the termination of the interstate transportation thereof, would not be a direct burden upon the interstate commerce and business of the plaintiff and would not be contrary to or in violation of the provisions of Clause 3 of Section 8 of Article I of the Constitution of the United States and the rights, privileges and immunities of the plaintiff thereunder.

(4) By reason of the facts and circumstances hereinbefore found and concluded plaintiff's application for a permanent injunction should be denied and the bill of complaint on file herein should be dismissed.

Let the Decree be entered accordingly.

William Denman (United States Circuit Judge).
Michael J. Roche (United States District Judge).
—— —— (United States Circuit Judge).

Due service and receipt of a copy of the foregoing proposed findings of fact and conclusions of law is hereby acknowledged this 18th day of May, 1938.

Pillsbury, Madison & Sutro, Attorneys for Plaintiff.

Approved as to form as provided by Rule 22.

Pillsbury, Madison & Sutro, Attorneys for Plaintiff.

[File endorsement omitted.]

[fol. 142] In United States District Court

[Title omitted]

Objections to Conclusions of Law Proposed by Defendants, and Conclusions of Law Proposed by Plaintiff—Filed May 25, 1938

[fol. 143] The plaintiff above named objects to the conclusions of law proposed by the defendants herein and lodged with the clerk of this court, as follows:

1. To such conclusions as a whole, on the grounds that they are insufficient, incomplete and incorrect and deny to plaintiff the relief to which it is lawfully and equitably entitled; that they are not supported or justified by the find-

ings of fact and the admitted allegations of the bill of complaint herein; and that said findings of fact and admitted allegations of the bill of complaint necessitate the decision and conclusion, contrary to the decision and conclusion expressed in said proposed conclusions of law, that plaintiff is entitled to the relief prayed for in its said bill of complaint.

2. To proposed Conclusion of Law No. 3, upon the grounds that it is not supported or justified by the findings of fact and the admitted allegations of the bill of complaint, and that said findings of fact and admitted allegations of said bill of complaint support no conclusion in respect of the matters embraced in said proposed Conclusion No. 3, other than a conclusion contrary to said proposed Conclusion No. 3.

3. To proposed Conclusion of Law No. 4, upon the grounds that it is not supported or justified by the findings of fact and the admitted allegations of the bill of complaint, and that said findings of fact and admitted allegations of said bill of complaint support no conclusion, in respect of the matters embraced in said proposed Conclusion No. 4, other than a conclusion contrary to said proposed Conclusion No. 4.

In the event that the court should adopt said proposed conclusions of law or any of them as its conclusion or conclusions, plaintiff asks for an exception to the adoption of [fol. 144] each or all of said conclusions of law.

And plaintiff proposes to the court the following conclusions of law which plaintiff respectfully represents to be sufficient and correct and to be the only conclusions of law which are supported and justified by said findings of fact and admitted allegations of the bill of complaint, and plaintiff offers and moves the adoption of said conclusions of law each and separately, and in the event that the court refuses to adopt the same, asks for an exception to the denial thereof and to the denial of each one thereof:

Conclusions of Law

1. The court has jurisdiction of all of the parties hereto and of the subject matter of this action.

2. This suit arises under the Constitution of the United States.

3. The plaintiff has no plain, speedy or adequate remedy at law for the matters complained of in its bill of complaint and according to the facts heretofore found by this court.

4. If the enforcement of said California Use Tax Act of 1935 should not be restrained as prayed for in said bill of complaint, the plaintiff would suffer great and irreparable damage and injury.

5. All of the tangible personal property described in the foregoing findings of fact, from the time of its purchase as described in said findings of fact, was devoted to the service of inextricably intermingled interstate and intrastate communication and to use in carrying on the inextricably intermingled interstate and intrastate telephone and telegraph commerce and business of the plaintiff.

[fol. 145] 6. Each of the acts and transactions found in the foregoing findings of fact to have occurred with respect to the tangible personal property described in said findings of fact, after the termination of the interstate transportation thereof, is a use in and is necessary and incidental to and a part of the inextricably intermingled interstate and intrastate commerce and business of the plaintiff.

7. The California Use Tax Act of 1935, if applied to any act or transaction found in the foregoing findings of fact to have occurred with respect to the specific order equipment described in said findings of fact, after the termination of the interstate transportation thereof, would impose a tax upon the use of said property in interstate commerce.

8. The California Use Tax Act of 1935, if applied to any act or transaction found in the foregoing findings of fact to have occurred with respect to the stand-by facilities described in said findings of fact, after the termination of the interstate transportation thereof, would impose a tax upon the use of said property in interstate commerce.

9. The imposition of a use tax upon the acts and transactions found in the foregoing findings of fact to have occurred with respect to the tangible personal property described in said findings of fact, after the termination of the interstate transportation thereof, would be a direct burden upon the interstate commerce and business of the plaintiff.

10. The California Use Tax Act of 1935, if applied to any act or transaction found in the foregoing findings of fact

to have occurred with respect to the specific order equipment described in said findings of fact, after the termination of the interstate transportation thereof, would impose a direct tax upon the operation of an instrumentality of interstate commerce.

11. The California Use Tax Act of 1935, if applied to any [fol. 146] act or transaction found in the foregoing findings of fact to have occurred with respect to the stand-by equipment described in said findings of fact, after the termination of the interstate transportation thereof, would impose a direct tax upon the operation of an instrumentality of interstate commerce.

12. The threatened application of the California Use Tax Act of 1935, as found in the foregoing findings of fact, by the defendants, to the acts and transactions, or any of them, found in said findings of fact to have occurred with respect to the tangible personal property described in said findings of fact, after the termination of the interstate transportation thereof, is contrary to and in violation of the provisions of clause 3 of section 8 of Article I of the Constitution of the United States and the rights, privileges and immunities of the plaintiff thereunder.

13. The California Use Tax Act of 1935, if construed and applied by the defendants so as to impose a tax on the acts, or transactions, or any of them, found in the foregoing findings of fact to have occurred with respect to the tangible personal property described in said findings of fact, after the termination of the interstate transportation thereof, is contrary to and in violation of the provisions of clause 3 of section 8 of Article I of the Constitution of the United States and the rights, privileges and immunities of the plaintiff thereunder.

14. By reason of the facts and circumstances hereinbefore found and concluded, plaintiff is entitled to a permanent injunction as prayed for in its bill of complaint herein.

—— ——, U. S. Circuit Judge. —— ——, U. S. District Judge. —— ——, U. S. District Judge.

[fol. 147] Dated May 25, 1938.

Respectfully submitted, Pillsbury, Madison & Sutro, Attorneys for Plaintiff.

Due service and receipt of a copy of the foregoing objections to conclusions of law proposed by defendants, and conclusions of law proposed by plaintiff is hereby acknowledged this 25 day of May, 1938.

U. S. Webb, Attorney General; H. H. Linney, Deputy Attorney General, by James J. Arditto, Deputy Attorney General, Attorneys for Defendants.

Approved as to form as provided by Rule 22:

U. S. Webb, Attorney General; H. H. Linney, Deputy Attorney General, by James J. Arditto, Deputy Attorney General, Attorneys for Defendants.

[File endorsement omitted.]

[fol. 148] In United States District Court, Northern District of California, Southern Division

Equity. No. 4067R

The Pacific Telephone and Telegraph Company, a Corporation, Plaintiff,

vs.

John C. Corbett et al., Defendants

Final Decree—Filed June 14, 1938

This Cause Came on to be heard on the 28th day of December, 1937, and was argued by Pillsbury, Madison and Sutro by Francis N. Marshall, Esq., Attorneys for the plaintiff, and Honorable U. S. Webb, Attorney General of the State of California by H. H. Linney and James J. Arditto, Deputies Attorney General, and thereupon on consideration thereof, it is Ordered, Adjudged and Decreed as follows, to-wit:

That plaintiff's application for a permanent injunction be denied, and the plaintiff's bill of complaint be dismissed. [fol. 149] It is Further Ordered, Adjudged and Decreed that the defendants recover their costs herein expended.

Dated this 14th day of June, 1938.

William Denman, United States Circuit Judge. Michael J. Roche, United States District Judge. ——, United States District Judge.

Approved as to form, June 3, 1938.

Pillsbury, Madison & Sutro, Attorneys for Plaintiff.

Receipt of a copy of the within is admitted this 3rd day of June, 1938.

By Pillsbury, Madison & Sutro, Attorneys for Plaintiff.

[File endorsement omitted.]

[fol. 150] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL, ASSIGNMENT OF ERRORS, AND PRAYER FOR REVERSAL—Filed June 20, 1938

[fol. 151] Petition for Appeal

Considering itself aggrieved by the final judgment and decree of the District Court of the United States for the Northern District of California, Southern Division, specially constituted under section 266 of the Judicial Code, in the above entitled cause, the plaintiff therein, The Pacific Telephone and Telegraph Company, hereby prays that an appeal be allowed to the Supreme Court of the United States herein and for an order fixing the amount of the bond thereon.

Assignment of Errors

And the said plaintiff assigns the following errors in the record and proceedings in the said cause:

The District Court of the United States for the Northern District of California, Southern Division, erred in the following particulars:

1. The court erred in concluding as a matter of law that the imposition of the California use tax upon the acts and transactions found to have occurred with respect to the tangible personal property described in the findings of fact, after the termination of the interstate transportation thereof, would not be a direct burden upon the interstate commerce and business of the plaintiff.

2. The court erred in concluding as a matter of law that the imposition of the California use tax upon the acts and transactions found to have occurred with respect to the

tangible personal property described in the findings of fact, after the termination of the interstate transportation thereof, would not be contrary to or in violation of the provisions of clause 3 of section 8 of Article I of the Constitu-[fol. 152] tion of the United States and the rights, privileges and immunities of the plaintiff thereunder.

3. The court erred in concluding as a matter of law that plaintiff's application for a permanent injunction should be denied and the bill of complaint dismissed.

4. The court erred in failing and refusing to conclude as a matter of law, as requested by the plaintiff, that the imposition of a use tax upon the acts and transactions found to have occurred with respect to the tangible personal property described in the findings of fact, after the termination of the interstate transportation thereof, would be a direct burden upon the interstate commerce and business of the plaintiff.

5. The court erred in failing and refusing to conclude as a matter of law, as requested by the plaintiff, that the California Use Tax Act of 1935 (Cal. Stats. 1935, p. 1297), if applied to any act or transaction found to have occurred with respect to the specific order equipment described in the findings of fact, after the termination of the interstate transportation thereof, would impose a direct tax upon the operation of an instrumentality of interstate commerce.

6. The court erred in failing and refusing to conclude as a matter of law, as requested by the plaintiff, that the California Use Tax Act of 1935 (Cal. Stats. 1935, p. 1297), if applied to any act or transaction found to have occurred with respect to the stand-by facilities described in the findings of fact, after the termination of the interstate transportation thereof, would impose a direct tax upon the operation of an instrumentality of interstate commerce.

7. The court erred in failing and refusing to conclude as [fols. 153-202] a matter of law, as requested by the plaintiff, that the California Use Tax Act of 1935 (Cal. Stats. 1935, p. 1297), if construed and applied by the defendant so as to impose a tax upon the acts or transactions, or any of them, found to have occurred with respect to the tangible personal property described in the findings of fact, after the termination of the interstate transportation thereof, is contrary to and in violation of the provisions of clause 3

of section 8 of Article I of the Constitution of the United States and the rights, privileges and immunities of the plaintiff thereunder.

8. The court erred in failing and refusing to conclude as a matter of law, as requested by the plaintiff, that plaintiff is entitled to a permanent injunction as prayed for in its bill of complaint.

9. The court erred in decreeing that plaintiff's application for a permanent injunction be denied.

10. The court erred in decreeing that plaintiff's bill of complaint be dismissed.

Prayer for Reversal

For which errors the plaintiff, The Pacific Telephone and Telegraph Company, prays that the said decree of the District Court for the Northern District of California, Southern Division, dated June 14, 1938, in the above entitled cause, be reversed, and that said court be ordered to enter a decree in favor of said plaintiff, and that the plaintiff be awarded its costs.

Alfred Sutro, Francis N. Marshall, Counsel for Appellant.

[File endorsement omitted.]

[fol. 203] In United States District Court

[Title omitted]

Order Allowing Appeal—Filed June 20, 1938

[fol. 204] The appellant in the above entitled suit, having prayed for the allowance of an appeal in this cause to the Supreme Court of the United States from the decree made and entered in the above entitled suit by the District Court of the United States for the Northern District of California, Southern Division, on the 14th day of June, 1938, and from each and every part thereof, and having presented and filed its petition for appeal, assignment of errors, and prayer for reversal, pursuant to the statutes and rules of the Supreme Court of the United States in such case made and provided;

It is now here Ordered that an appeal be, and the same is hereby allowed to the Supreme Court of the United States from the District Court of the United States for the Northern District of California, Southern Division, in the above entitled cause, as provided by law, and it is further ordered that the clerk of said District Court shall prepare and certify a transcript of the record, proceedings and decree in this cause and transmit the same to the Supreme Court of the United States, so that he shall have the same in said court within sixty (60) days of this date.

And it is further Ordered that security for costs on appeal be fixed in the sum of $500.00.

Dated June 20, 1938.

William Denman, United States Circuit Judge.

[File endorsement omitted.]

[fols. 205-210] Bond on Appeal for $500.00, approved and filed June 22, 1938, omitted in printing.

[fol. 211] In United States District Court

[Title omitted]

Stipulation as to Contents of Transcript of Record—Filed June 21, 1938

[fol. 212] It is hereby stipulated that the transcript of record to be filed in the Supreme Court of the United States, pursuant to the appeal heretofore allowed herein, shall include the following:

1. Bill of complaint for injunction, including exhibit attached thereto;
2. Motion for temporary restraining order and application for hearing for interlocutory injunction;
3. Order noticing necessity for other judges, issuing temporary restraining order and order to show cause for temporary injunction;
4. Proof of service of bill of complaint, order to show cause, etc., on the Governor of the State of California;

5. Motion to dismiss bill of complaint;
6. Opinion, filed September 10, 1937;
7. Opinion referred to therein, being opinion filed same date in Southern Pacific Company v. John C. Corbett, et al., Equity No. 4055-S;
8. Decree for interlocutory injunction;
9. Answer to bill of complaint to enjoin collection of taxes under California Use Tax Act of 1935;
10. Stipulation of facts;
11. Opinion, filed May 4, 1938;
12. Opinion referred to therein, being opinion filed May 3, 1938, in Southern Pacific Company v. John C. Corbett, et al., Equity No. 4055-S;
13. Findings of fact and conclusions of law proposed by defendants, and adopted by the court;
14. Objections to conclusions of law proposed by defendants, and conclusions of law proposed by plaintiff;
15. Final decree;
[fol. 213] 16. Petition for appeal, assignment of errors, and prayer for reversal;
17. Statement as to jurisdiction;
18. Order allowing appeal;
19. Bond for costs;
20. Original citation, with acknowledgment of service;
21. Notice under Rule 12, paragraph 2, and acknowledgment of service of appeal papers;
22. Stipulation as to contents of transcript of record.

Inasmuch as the case was submitted on the complaint, answer and stipulation of facts, which are to be included in the transcript of record as herein stipulated, there is no narrative statement of evidence pursuant to Equity Rule 75.

It is agreed that the bonds for temporary restraining order, the bonds for interlocutory injunction, the order of the court restoring and continuing interlocutory injunction pending appeal, and the bond therefor, all heretofore filed herein, are not necessary to the consideration of the appeal and need not be included in the transcript of record.

Alfred Sutro, Francis N. Marshall, Counsel for Appellant. U. S. Webb, Attorney General; H. H. Linney, Deputy Attorney General, by James J. Arditto, Deputy Attorney General, Counsel for Appellees.

[File endorsement omitted.]

[fol. 214] Clerk's certificate to foregoing transcript omitted in printing.

[fols. 215-216] Citation, in usual form, showing service on U. S. Webb et al., filed June 21, 1938, omitted in printing.

[fol. 217] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF THE PARTS OF THE RECORD TO BE PRINTED—Filed July 19, 1938

The appellant adopts its assignment of errors as its statement of the points to be relied upon in this court.

The appellant designates the whole of the record, as filed, to be printed, except Exhibit "A" to the bill of complaint (page 35 of the original certified transcript), the same being a copy of the California Use Tax Act of 1935, which is now officially published in Cal. Stats., 1935, p. 1297, ch. 361.

Alfred Sutro, Francis N. Marshall, Counsel for Appellant.

[fol. 218] Due service and receipt of a copy of the foregoing statement of points to be relied upon and designation of the parts of the record to be printed is hereby acknowledged this 13th day of July, 1938.

U. S. Webb, Attorney General; H. H. Linney, Deputy Attorney General, by James J. Arditto, Deputy Attorney General, Counsel for Appellees.

[fol. 219] [File endorsement omitted.]

Endorsed on cover: File No. 42,698. N. California, D. C. U. S. Term No. 213. The Pacific Telephone and Telegraph Company, appellant, vs. John C. Corbett, Fred E. Stewart, Richard E. Collins, William G. Bonelli and Harry B. Riley, as Members of the State Board of Equalization of the State of California. Filed July 19, 1938. Term No. 213, O. T., 1938.